Supreme Court, U.S.
FILED

01 579 OCT 04 2001

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

RILEY HAGAN, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL B. DONALD
Counsel of Record
LEMLE, KELLEHER, BARLOW & HARDTNER
401 Edwards Street
Tenth Floor, Louisiana Tower
Shreveport, LA 71101
Telephone: (318) 227-1131
Facsimile: (318) 227-1141

Attorneys for Petitioner, Riley Hagan, III

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

274?1

QUESTION PRESENTED

Whether this Court should resolve the conflict that exists between the United States Courts of Appeals for the Second, Fourth, Fifth, Ninth, and Tenth Circuits, on the one hand, and the United States Courts of Appeals for the First, Sixth, Seventh, Eighth, and Eleventh Circuits, on the other, as to the important constitutional issue of whether the omission of an element of the crime of conviction from a federal indictment is a constitutional violation not subject to a finding of harmless error.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

THE OMISSION OF AN ELEMENT OF THE CRIME OF CONVICTION FROM A FEDERAL INDICTMENT IS A CONSTITUTIONAL VIOLATION NOT SUBJECT TO A FINDING OF HARMLESS ERROR 9

A. The Government's Failure To Charge Hagan With The Essential Element Of "Amount Of Misapplied Funds" For His Felony Offense Of Conviction Violates The Constitutional Principles Of *Apprendi* 12

B. An *Apprendi* Violation Involving An Omission From A Federal Indictment Is Not Subject To A Finding Of Harmless Error 17

C. *Apprendi* Requires That Before Restitution Orders Be Imposed, The Fact And Amount Of Loss Must Be Charged And Proved Beyond A Reasonable Doubt 25

CONCLUSION 26

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), *leave to file reh'g denied*, 530 U.S. 1299, 121 S.Ct. 24, 147 L.Ed.2d 1047 (2000) 10, 22

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ..... *passim*

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991) 4

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 16

Clark v. People, 1 Scam. 117, 2 Ill. 117 (1833) 13

Commonwealth v. Smith, 1 Mass. 245 (1804) 13

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, *reh'g denied*, 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968) 5

Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) 10

Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590, *reh'g denied*, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974) 5, 23

Hope v. Commonwealth, 9 Metcalf 134, 50 Mass. 134 (1845) 13

Jenkins v. McKeithen, 395 U.S. 411, 80 S.Ct. 1843, 23 L.Ed.2d 404, *reh'g denied*, 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123 (1969) 10

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) 10, 23

TABLE OF AUTHORITIES – Continued

Page

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) 6

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) 4

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 4, 19, 23

Packnett v. United States Government, 503 F.2d 949 (5th Cir. 1974) 17

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) 5

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) 10

Smith v. United States, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959) 10

State v. Garner, 8 Port. 447 (Ala. 1839) 13

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 5

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) 4, 23

United States v. Angeles-Mascote, 206 F.3d 529 (5th Cir. 2000) 20

United States v. Baptiste, ___ F.3d ___, 2001 WL 1006712 (5th Cir. Aug. 31, 2001) 18, 19

United States v. Bates, ___ F.3d ___, 2001 WL 1006240 (6th Cir. Aug. 21, 2001) 24

United States v. Berrios-Centeno, 250 F.3d 294 (5th Cir. 2001), *petition for cert. filed* Jul. 24, 2001 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Booker, 260 F.3d 820 (7th Cir. 2001) 24

United States v. Brown, 164 F.3d 518 (10th Cir. 1998) 11

United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001), *vacated and reh'g en banc granted*, ___ F.3d ___, 2001 WL 1091167 (9th Cir. Sept. 14, 2001) 18

United States v. Cabrera-Teran, 168 F.3d 141 (5th Cir. 1999) 11, 19, 20

United States v. Candelario, 240 F.3d 1300 (11th Cir.), *cert. denied*, 121 S.Ct. 2535, 150 L.Ed.2d 705 (2001), *reh'g denied*, ___ S.Ct. ___, 2001 WL 1018806 (Sept. 7, 2001) 15

United States v. Cargill, ___ F.3d ___, 2001 WL 1019312 (4th Cir. Sept. 6, 2001) 17

United States v. Ciongoli, 358 F.2d 439 (3d Cir. 1966) 17

United States v. Cotton, 261 F.3d 397 (4th Cir. 2001) 17

United States v. Critzer, 951 F.2d 306 (11th Cir. 1992) 11

United States v. Deisch, 20 F.3d 139 (5th Cir. 1994) 13

United States v. Duarte, 246 F.3d 56 (1st Cir. 2001) 3, 12, 24

United States v. Farrell, 609 F.2d 816 (5th Cir. 1980) 6

United States v. Fisher, 5 McLean 23, 25 F.Cas. 1086 (C.C.D. Ohio 1849) (No. 15,102) 13

United States v. Fitzgerald, 89 F.3d 218 (5th Cir.), *cert. denied*, 519 U.S. 987, 117 S.Ct. 446, 136 L.Ed.2d 342 (1996) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Gaytan, 74 F.3d 545 (5th Cir.), *cert. denied*, 519 U.S. 821, 117 S.Ct. 77, 136 L.Ed.2d 36, *cert. denied*, 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996) 20

United States v. Gonzalez, 259 F.3d 355 (5th Cir. 2001), *vacated and reh'g en banc granted*, ___ F.3d ___, 2001 WL 946413 (5th Cir. Aug. 15, 2001) 4, 11, 18, 21

United States v. Jones, 194 F.3d 1178 (10th Cir. 1999), *vacated and remanded, Jones v. United States*, 530 U.S. 1271, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000), *opinion after remand, United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000) 18, 23

United States v. Kramer, 289 F.2d 909 (2d Cir. 1961) 14

United States v. Longoria, 259 F.3d 363 (5th Cir. 2001), *vacated and reh'g en banc granted*, ___ F.3d ___, 2001 WL 946413 (5th Cir. Aug. 15, 2001) 4, 18, 21

United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) 10

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000) 18

United States v. Outler, 659 F.2d 1306 (5th Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 665 (1982) 19

United States v. Pease, 240 F.3d 938 (11th Cir. 2001), *petition for cert. filed* July 6, 2001 24

United States v. Poulack, 236 F.3d 932 (8th Cir. 2001), *reh'g and reh'g en banc denied, petition for cert. filed* June 8, 2001 24

United States v. Rickert, 459 F.2d 352 (5th Cir. 1972) 6

TABLE OF AUTHORITIES – Continued

Page

United States v. Sharp, 12 F.3d 605 (6th Cir. 1993) 13

United States v. Slaughter, 238 F.3d 580 (5th Cir. 2000), *reh'g and reh'g en banc denied*, 248 F.3d 1141 (5th Cir.), *cert. denied*, 121 S.Ct. 2015, 149 L.Ed.2d 1015 (2001) 18

United States v. Smith, ___ F.3d ___, 2001 WL 984691 (5th Cir. Aug. 28, 2001) 18

United States v. Stafford, 258 F.3d 465 (6th Cir. 2001) 24

United States v. Stone, 139 F.3d 822 (11th Cir. 1998) 13

United States v. Tran, 234 F.3d 798 (2d Cir. 2000) 11, 17, 18, 21

United States v. Vasquez-Zamora, 253 F.3d 211 (5th Cir. 2001) 4, 11, 18

STATUTES

18 U.S.C. § 371 .... *passim*

18 U.S.C. § 656 .... *passim*

18 U.S.C. § 1326(b)(2) 22

18 U.S.C. § 3663 .... 2, 25

18 U.S.C. § 3663A 2, 25

18 U.S.C. § 3664 2

28 U.S.C. § 1254(1) 2

CONSTITUTION

U.S. Const. amend. V 2, 5, 10, 23

U.S. Const. amend. VI 2, 20, 22, 23

TABLE OF AUTHORITIES – Continued

Page

RULES

Federal Rule of Criminal Procedure 11 16

Sup.Ct.R. 10(a) 12

U.S.S.G. § 2F1.1 6

MISCELLANEOUS

Pattern Instruction 2.32 (18 U.S.C. § 656), *Fifth Circuit Pattern Jury Instructions (Criminal Cases)* (West 1999) 22

Alan Ellis, Peter Goldberger, James H. Feldman, Jr. & Karen L. Landau, *Apprehending And Appreciating Apprendi*, 15-WTR Crim. Just. 16 (2001) 16, 25

John K. Zwerling, *Comprendez Apprendi*, 38 Am. Crim. L. Rev. 309 (2001) 18

Lesley B. Whitcomb, *Editor's Note On Apprendi Symposium Articles*, 38 Am. Crim. L. Rev. 241 (2001) 9

Nancy J. King & Susan R. Klein, *Apres Apprendi*, 12 Fed. Sent. Rep. 331 (2000) 5, 18

Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467 (2001) 13

Richard Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 Fed. Sent. Rep. 203 (2000) 14

Stephanos Bibas, *Judicial Fact-Finding And Sentence Enhancements In A World Of Guilty Pleas*, 110 Yale L.J. 1097 (2001) 14, 20

OPINIONS BELOW

The June 7, 2001, per curiam opinion of the United States Court of Appeals for the Fifth Circuit is unrecorded and is attached hereto in the Appendix at App. 1 to App. 4. The Second Amended Judgment In A Criminal Case entered by the United States District Court for the Western District of Louisiana, Shreveport Division, dated December 4, 2000, is attached hereto in the Appendix at App. 66 to App. 72. The reasons for sentence of the District Court, Judge Donald E. Walter, were oral, not written, and this transcript is attached in the Appendix hereto at App. 5 to App. 17.

JURISDICTION

The petitioner, Riley Hagan, III, respectfully prays that a writ of certiorari be issued to review the June 7, 2001, per curiam opinion of the United States Court of Appeals for the Fifth Circuit, affirming his felony conviction and sentence under federal conspiracy and willful misapplication of bank funds law, 18 U.S.C. §§ 371 & 656, originally entered by the United States District Court for the Western District of Louisiana, Shreveport Division, Judge Donald E. Walter. Petitions for Rehearing and Rehearing En Banc were timely filed by petitioner with the United States Court of Appeals for the Fifth Circuit and were denied by order dated July 6, 2001. Appendix at App. 87 to App. 88.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V, full text set out in Appendix hereto at App. 89.

U.S. Const. amend. VI, full text set out in Appendix hereto at App. 89.

Section 371 of Title 18, United States Code (18 U.S.C. § 371), full text set out in Appendix hereto at App. 90.

Section 656 of Title 18, United States Code (18 U.S.C. § 656), full text set out in Appendix hereto at App. 90 to App. 91.

Section 3663 of Title 18, United States Code (18 U.S.C. § 3663), full text set out in Appendix hereto at App. 92 to App. 97.

Section 3663A of Title 18, United States Code (18 U.S.C. § 3663A), full text set out in Appendix hereto at App. 97 to App. 101.

Section 3664 of Title 18, United States Code (18 U.S.C. § 3664), full text set out in Appendix hereto at App. 101 to App. 109.

STATEMENT OF THE CASE

This case raises in the most direct form the important constitutional question of whether an *Apprendi* error affecting the indictment – the failure to charge an essential element of the offense of conviction and have it determined by a jury beyond a reasonable doubt – will warrant relief, even if the defendant admitted the omitted element at a plea proceeding. *See Apprendi v. New Jersey*, 530 U.S. 466, 488-490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000) (establishing the constitutional principle that any fact that increases the penalty for a crime beyond the prescribed statutory maximum is an element of the offense of conviction entitled to the Constitution's full procedural protections);[1] *id.* at 2368-76 (Thomas, J., concurring) (discussing cases concerning sufficiency of allegations in charging instrument as support for *Apprendi* principle). Several circuit courts, including the Fifth Circuit in this case in an errant and unexplained departure from its own established and subsequent precedent, have eroded the constitutional principles established in *Apprendi, supra*, by excusing clear error affecting an indictment under a harmless error analysis. *See, e.g., United States v. Duarte*, 246 F.3d 56 (1st Cir. 2001) (*Apprendi* error in sentencing defendant to term above default statutory maximum for unspecified drug quantity held not to affect substantial rights of defendant who accepted responsibility for drug quantity required for

---

[1] The Court's full statement of the principle includes a recidivism exception, but the continuing validity of that exception is highly questionable. *Apprendi, supra*, 120 S.Ct. at 2361-62, 2366; *id.* at 2379 (Thomas, J., concurring).

enhanced sentence in plea agreement); *but see, e.g., United States v. Longoria*, 259 F.3d 363 (5th Cir. 2001), *vacated and reh'g en banc granted*, ___ F.3d ___, 2001 WL 946413 (5th Cir. Aug 15, 2001) (holding that failure to charge an offense in the indictment is a jurisdictional error); *United States v. Gonzalez*, 259 F.3d 355 (5th Cir. 2001), *vacated and reh'g en banc granted*, ___ F.3d ___, 2001 WL 946413 (5th Cir. Aug. 15, 2001) (resentencing required under the plain error standard where sentence exceeded statutory maximum of the crime charged in the indictment even though factual basis for guilty plea established drug quantity required for enhanced sentence); *United States v. Vasquez-Zamora*, 253 F.3d 211 (5th Cir. 2001) (same). Such erosion of these paramount and, indeed, structural constitutional maxims is unsound and constitutes a departure from the established jurisprudence of this Court. *See Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (a limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal); *Monge v. California*, 524 U.S. 721, 738-41, 118 S.Ct. 2246, 2255-2256, 141 L.Ed.2d 615 (1998) (Scalia, J., dissenting) (stating that only reason for "elements rule" was that, without such rule, legislatures could evade the rights to jury trials and proof beyond a reasonable doubt); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (per se rule applied where the judge fails to instruct the jury that it has to find the defendant guilty beyond a reasonable doubt); *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991) (holding that the type of right that was violated

determines whether the harmless error rule applies; constitutional errors characterized as trial errors are subject to harmless error analysis, whereas structural errors are not); *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977) (holding that the government must prove all elements beyond a reasonable doubt); *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590, *reh'g denied*, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974) (holding that all elements must be included in the indictment); *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491, *reh'g denied*, 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968) (holding that the government must prove all elements to the jury); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (constructive amendment of indictment violates Fifth Amendment); *see also* Nancy J. King & Susan R. Klein, *Apres Apprendi*, 12 Fed. Sent. Rep. 331, 337-38 & n. 20 (2000) (hereafter "King, *Apres Apprendi*") (noting the majority view that an omission of an element from the indictment is never harmless error).

The simple factual setting of this case demonstrates the critical importance of the aforementioned constitutional question. On November 12, 1999, the petitioner, Riley Hagan, III ("Hagan"), pled guilty to a single count bill of information charging violation of 18 U.S.C. § 371.[2] *See* Appendix at App. 133 to App. 135. This conspiracy count charged violation of 18 U.S.C. § 656, the willful misapplication of bank funds. The bill of information, however, was silent as to the amount of misapplied funds

---

[2] Hagan's sole waiver of indictment concerned this specific information.

that the government attributed to Hagan's conduct. Neither the "offense" nor "overt acts" section of the bill of information set out the amount allegedly misapplied by Hagan. This fact alone, the amount of misapplied funds, is the fact determinative of the grade offense involved – i.e., misdemeanor or felony.[3]

Despite this fundamental flaw, the district court imposed a sentence based upon a purported felony conviction and the probation officer's determination of loss[4] in the Presentence Report ("PSR"). The bill of information, however, did not set forth the amount of misapplied

---

[3] The simplest formulation of the *Apprendi* principle defines the prescription of a maximum sentence by reference to the statute cited as the offense of conviction. *Apprendi*, 120 S.Ct. at 2354 & 2365. The offense of conviction is controlling and no sentence may exceed its maximum. *Id.* A misdemeanor violation of 18 U.S.C. §§ 371 & 656 carries a maximum sentence of 1 year imprisonment and fine, whereas a felony violation exposes a defendant to 5 years imprisonment and fine.

[4] "Loss" under the guidelines is not synonymous with the essential element of "amount of misapplied funds" set forth in 18 U.S.C. § 656. To establish the crime of "willful misapplication of bank funds," it is not necessary for the government to allege or prove that the bank actually suffered any loss. *See United States v. Farrell*, 609 F.2d 816, 819 (5th Cir. 1980); *United States v. Rickert*, 459 F.2d 352, 354-5 (5th Cir. 1972). "Loss" only becomes the "tail that wags the dog" via the Federal Sentencing Guidelines. *See* U.S.S.G. § 2F1.1; *Apprendi*, 120 S.Ct. at 2368 (Thomas, J., concurring) ("a 'crime' includes every fact that is by law a basis for imposing or increasing punishment. . . . "); *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S.Ct. 2411, 2417, 91 L.Ed.2d 67 (1986). "Loss" is distinct from "amount of misapplied funds," and nowhere in the bill of information is the position of the government set forth as to the latter.

funds. The government's position as to amount of misapplied funds can only be gleaned from the Fifth Circuit pattern jury instruction for misapplication of bank funds included in the "Rule 11 Package" filed by the government at Hagan's guilty plea proceeding. *See* Appendix at App. 165. This instruction confirms established precedent and the government's knowledge thereof that the essential element distinguishing between a misdemeanor and felony charge of willful misapplication of bank funds is that "the amount of funds misapplied was in excess of $1,000." 18 U.S.C. § 656. Irrespective of this knowledge, the government was silent as to amount of misapplied funds in the charging document.

Not until the PSR was released on January 20, 2000, did the government set forth the amount of loss it attributed to Hagan's conduct. Hagan, in his objections to the PSR submitted to the district court on April 19, 2000, objected to and disputed the calculation of loss advanced by the government. *See* Appendix at App. 37 to App. 44, App. 168 to App. 178, and App. 204 to App. 236. In these objections and at sentencing, Hagan submitted evidence as to the existence of extensive collateral available to the bank that should have been considered to reduce the government's loss calculation. Evidence submitted at sentencing established that this collateral had a value anywhere from $6.5 million (as calculated by Hagan contemporaneous in time to the loss) to $1.6 million (as estimated by the bank three years later after final liquidation of portions of the collateral culminating sometime in early 2000).[5]

---

[5] The non-cash collateral consisted of a large inventory of crude oil and refined product (exceeding 201,477 barrels), real estate, equipment, and accounts receivable.

This collateral was pledged to secure any loss suffered by the bank, including losses from overdrafts.

At his guilty plea proceeding, Hagan did agree with the government's factual basis which set out that his actions, without credit for collateral and settlement,[6] caused an overdraft at the bank of $4.8 million. *See* Appendix at App. 136 to App. 154. Hagan was advised by the district court that the maximum possible sentence for his offense was five years of imprisonment and/or a fine of $1 million; he also acknowledged the maximum punishment in his plea agreement. Appendix at App. 136 to App. 154 and App. 160 to App. 163.

The district court originally passed sentence on May 4, 2000. A second amended final judgment in a criminal case was entered on December 4, 2000, after consideration of the government's Rule 35 Motion following Hagan's substantial assistance in a related prosecution and conviction. Appendix at App. 66 to App. 72. The district court found that the "amount of loss" was $4.8 million. The term of imprisonment imposed (25 months) was based upon the thirteen (13) level enhancement for loss proposed in the PSR. Full restitution was imposed; however, the district court diverged from the PSR by

---

[6] Deposit Guaranty National Bank ("DGNB") filed a civil suit against Hagan concerning the identical circumstances of this criminal proceeding and that suit was settled by Hagan's payment of $800,000.00 and other valuable consideration. *See* Appendix at App. 179 to App. 193. In the settlement, Hagan agreed to dismiss counterclaims he had filed against DGNB and DGNB agreed to indemnify Hagan for any and all losses he suffered as a result of the facts giving rise to the lawsuit, which are the same facts that resulted in the charges in this action. *Id.*

allowing Hagan credits or offsets due to (1) Hagan's settlement of his civil dispute with DGNB in the amount of $800,000.00, and (2) cash collateral on deposit with DGNB in the amount of $62,000.00.

REASONS FOR GRANTING THE WRIT

THE OMISSION OF AN ELEMENT OF THE CRIME OF CONVICTION FROM A FEDERAL INDICTMENT IS A CONSTITUTIONAL VIOLATION NOT SUBJECT TO A FINDING OF HARMLESS ERROR.

In June 2000, this Court decided *Apprendi, supra,* a case that well-nigh immediately took on the distinction of a "watershed ruling." *Id.* at 2380 (O'Connor, J., dissenting) ("Today, in what will surely be remembered as a watershed change in constitutional law, the court imposes as a constitutional rule the principle it first identified in *Jones.*"); Lesley B. Whitcomb, *Editor's Note On Apprendi Symposium Articles,* 38 Am. Crim. L. Rev. 241 (2001). Therein, the Court imposed a procedural limitation on prosecutors by restricting the types of facts that may be proven at sentencing rather than at trial. Specifically, the Court adopted a constitutional principle that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element of the offense of conviction.[7] *Apprendi,* 120 S.Ct. at 2362-63. Under well

[7] The requirement of pleading each and every element provides: (1) notice adequate to prepare for trial or plea; (2) information to facilitate a claim of double jeopardy; (3) information for the judge who will rule on sufficiency of the charge; and, finally, (4) assurance that the grand jury took all

established constitutional doctrine, the Constitution's full procedural protections, especially the necessity of proof beyond a reasonable doubt, inclusion in the indictment, and trial by jury, apply to elements of offenses.[8] *Id.* at 2355-56.

The applicability of *Apprendi*'s principle to the instant case is clear and, in fact, acknowledged by the government and the Fifth Circuit. Yet, in this case the United

---

elements into consideration in voting to indict (the "grand jury review" function). *See, e.g., United States v. Miller*, 471 U.S. 130, 139-40, 105 S.Ct. 1811, 1816, 85 L.Ed.2d 99 (1985); *Jenkins v. McKeithen*, 395 U.S. 411, 430, 80 S.Ct. 1843, 1853, 23 L.Ed.2d 404, *reh'g denied*, 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123 (1969); *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1046-1047, 8 L.Ed.2d 240 (1962); *Smith v. United States*, 360 U.S. 1, 9, 79 S.Ct. 991, 996, 3 L.Ed.2d 1041 (1959); *Ex parte Bain*, 121 U.S. 1, 13, 7 S.Ct. 781, 787-788, 30 L.Ed. 849 (1887).

[8] The *Apprendi* decision did not directly discuss the issue of notice, because the Court has not incorporated the Fifth Amendment's Indictment Clause as a constitutional requirement in state cases. *Apprendi*, 120 S.Ct. at 2355 n. 3 (noting this aspect of case). Nevertheless, this Court has made clear that the principle it adopted in *Apprendi* requires the covered facts to be alleged in federal indictments or state charging instruments. *See Jones v. United States*, 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 1224 n. 6, 143 L.Ed.2d 311 (1999) (stating in appeal from federal conviction that covered facts "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 1228, 140 L.Ed.2d 350 (1998), *leave to file reh'g denied*, 530 U.S. 1299, 121 S.Ct. 24, 147 L.Ed.2d 1047 (2000) (citing that all elements of an offense must be charged in the indictment); *Apprendi*, 120 S.Ct. at 2368-76 (Thomas, J., concurring) (discussing cases concerning sufficiency of allegations in charging instrument as support for *Apprendi* principle).

States Court of Appeals for the Fifth Circuit, in an errant and unsupportable divergence from its established precedent, ignored this constitutional violation by finding, in essence, that harmless error excused its occurrence. Specifically, the Fifth Circuit held that *Apprendi* did not apply to nullify the felony conviction and sentence imposed against Hagan, when the omitted element from a federal indictment of the crime of conviction – i.e., the amount of loss, was admitted by Hagan at his plea proceeding.[9] *See* Appendix at App. 1 to App. 4. Although an aberration to Fifth Circuit precedent, *see, e.g., Gonzalez*, 259 F.3d 355; *Vasquez-Zamora*, 253 F.3d 211, this holding highlights the split of opinion that has developed in the United States circuit courts as to the applicability of "harmless error" to an *Apprendi* violation. *See, e.g., United States v. Tran*, 234 F.3d 798 (2d Cir. 2000) (stating majority view that an

---

[9] The Fifth Circuit wrongly examined information extraneous to the indictment to conclude that a felony grade offense, and not a misdemeanor, had been somehow constructively charged. *See United States v. Cabrera-Teran*, 168 F.3d 141, 145 (5th Cir. 1999) (indictment invalid for failing to put defendant on adequate notice of illegal re-entry charge because facially complete complaint cannot make up for shortcomings of indictment); *United States v. Brown*, 164 F.3d 518 (10th Cir. 1998) (defendant may not challenge indictment's allegations of location of crimes by relying on affidavits and evidence extrinsic to indictment because indictment is to be tested solely on basis of allegations made on its face); *United States v. Critzer*, 951 F.2d 306, 307-8 (11th Cir. 1992) (court should look only at face of indictment, not at facts government expects to prove). Compounding upon this error, the extraneous information wrongly considered by the Fifth Circuit concerned "loss" and not the essential element of "amount of misapplied funds." *See supra* fn. 4.

omission of an element from the indictment is never harmless error); *but see, e.g., Duarte*, 246 F.3d 56 (stating contrary view). It is this dichotomy of constitutional opinion that this Court must resolve. *See* Sup.Ct.R. 10(a).

Whichever path this Court chooses to resolve the question presented will guide many lower courts, both federal and state, in the numerous cases which are now working their way through the judicial system. This petition aptly presents this question for final resolution by the United States Supreme Court.

A. The Government's Failure To Charge Hagan With The Essential Element Of "Amount Of Misapplied Funds" For His Felony Offense Of Conviction Violates The Constitutional Principles Of *Apprendi*.

In its response to Hagan's appeal, the government concedes and the Fifth Circuit's June 7, 2001, per curiam opinion (Appendix at App. 1 to App. 4) recognizes that an essential element of Hagan's offense of conviction (conspiracy to willfully misapply bank funds in excess of $1,000, 18 U.S.C. §§ 371 & 656) was not charged in the bill of information and determined under a reasonable doubt standard. The characterization of this omission as involving an essential element of a crime cannot seriously be challenged.

The pivotal value determination omitted – the amount of misapplied funds, is the fact determinative of the grade offense involved – i.e., misdemeanor or felony. Even prior to *Apprendi*, several cases cited this reason as a basis for recognizing as "elements" facts that boost what

would otherwise be misdemeanor penalties to felony levels. *See, e.g., United States v. Stone*, 139 F.3d 822, 837-38 (11th Cir. 1998); *United States v. Deisch*, 20 F.3d 139, 147 (5th Cir. 1994); *United States v. Sharp*, 12 F.3d 605, 606 (6th Cir. 1993); *see also* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1474 & n. 20 (2001).

Further support for the characterization of this omitted value determination as an essential element of Hagan's offense of conviction is found in the treatment at common law such value determinations received. At common law, punishment for certain crimes (*e.g.*, larceny) depended upon the value of the items involved. *See Commonwealth v. Smith*, 1 Mass. 245 (1804) (since the distinction between simple and grand larceny was based on the value of the stolen goods, the court held that because the value of the goods had not been charged in the indictment, the defendant could not be sentenced); *Hope v. Commonwealth*, 9 Metcalf 134, 50 Mass. 134 (1845) (larceny statute set forth two levels of sentencing based on the value of the stolen property; therefore, the court held that the value of the property was an element of the crime because the punishment depended on the value).[10]

---

[10] *See also United States v. Fisher*, 5 McLean 23, 25 F.Cas. 1086 (C.C.D. Ohio 1849) (No. 15,102) (noting that when a statute provides that a mail carrier is subject to a higher penalty for stealing a letter containing an article of value, the indictment must allege that the letter contained an article of value, "which aggravates the offense and incurs a higher penalty"); *State v. Garner*, 8 Port. 447, 448 (Ala. 1839) (reversing a conviction for malicious mischief, because the indictment failed to allege the value of the horse that was killed, when the fine was capped at four-fifths of the value of the property destroyed); *Clark v. People*, 1 Scam. 117, 120, 2 Ill. 117 (1833) (finding an indictment

Therefore, in this case the omission from the charging document of the essential element of "amount of misapplied funds," even though Hagan ultimately pled guilty, unmistakably raises the scepter of *Apprendi, supra.*

Moreover, although Hagan pled guilty, the principles announced in *Apprendi, supra,* are equally applicable to the instant case. Stephanos Bibas, *Judicial Fact-Finding And Sentence Enhancements In A World Of Guilty Pleas,* 110 Yale L.J. 1097 (2001) (hereafter "Bibas, *Guilty Pleas*"). Indeed, *Apprendi* itself originated in a guilty plea. *Apprendi,* 120 S.Ct. at 2352. Apprendi himself, before the New Jersey trial court, was warned repeatedly, in his plea agreement and at the plea colloquy, that the prosecution would seek the hate-crime enhancement. *See* Joint Appendix at 17-24, *Apprendi,* 120 S.Ct. 2348 (No. 99-478) (hereafter "*Apprendi* Joint Appendix"). However, such enhancement was not asserted in the charging document. *Apprendi,* 120 S.Ct. at 2352. None of the counts levied against Apprendi cited the state hate-crime statute or alleged a racially biased purpose. *See Apprendi* Joint Appendix at 2-12. After hearing before the trial judge, facts allowing an enhanced sentence were nonetheless found by a preponderance of the evidence, and the

---

for arson insufficient for not alleging the value of a building destroyed by fire, when punishment included a fine equal to the value of the burned property). Statutorily enunciated distinctions which increase maximum sentences have always been put in the hands of the jury, no matter how characterized. *See, e.g., United States v. Kramer,* 289 F.2d 909, 921 (2d Cir. 1961); *see also* Richard Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction,* 12 Fed. Sent. Rep. 203 (2000).

enhanced sentence was imposed by the judge. *See* Petition for Writ of Certiorari at 138a-144a, *Apprendi*, 120 S.Ct. 2348 (No. 99-478). This Court ultimately reversed, establishing the principles which the petitioner herein contends require the same result.

Because it is the government's duty to ensure that it charged the proper offense, a defendant, Hagan in the instant matter, had no responsibility to point out that the government could have charged him with a greater offense. *See United States v. Candelario*, 240 F.3d 1300, 1305-06 (11th Cir.), *cert. denied*, 121 S.Ct. 2535, 150 L.Ed.2d 705 (2001), *reh'g denied*, ___ S.Ct. ___, 2001 WL 1018806 (Sept. 7, 2001).[11] Thus, by pleading guilty to the misdemeanor charge, Hagan's exposure to sentence only at this

---

[11] The Eleventh Circuit's reasoning in *Candelario*, 240 F.3d at 1305-06, is sound: "The rationale behind this is simple. If the indictment properly charges an offense, it would be unproductive and run contrary to a defendant's interest to require him to object to the indictment's failure to specify a quantity amount. If we insisted on an objection to the indictment, we would effectively be forcing a defendant to claim that the Government has undercharged him. That is, the defendant would basically be forced to assert that the Government could have indicted him for a section 841(b)(1)(A) or section 841(b)(1)(B) offense rather than the section 841(b)(1)(C) offense the Government is currently charging. Because it is the Government's duty to ensure that it has charged the proper offense, a defendant has no responsibility to point out that the Government could have charged him with a greater offense. Similarly, it would be fruitless to insist that, at trial, a defendant must request the court to instruct the jury to determine quantity. Section 841(b)(1)(C) permits sentencing without regard to quantity, in which event a jury finding a quantity is unnecessary." (Footnotes omitted).

lower level is constitutionally required. *See* 18 U.S.C. § 656; *Apprendi*, 120 S.Ct. at 2365 ("[T]he relevant inquiry is one . . . of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). Hagan's guilty plea, thus, should have exposed him only to punishment for the lesser sanctions applicable to the misdemeanor offense. *See* 18 U.S.C. §§ 371 & 656. The district court, however, penalized Hagan for the government's apparent mistake and imposed a felony sentence. This result is per se unconstitutional and should be reversed.

Hagan's purported felony conviction and sentence are also constitutionally infirm under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant who pleads guilty can only be found by the judge to be guilty if the plea is knowing and intelligent. *Id.* A defendant who pleads guilty without knowing the government's burden of proof concerning an essential element of the offense, where these facts establish the statutory maximum, as in the instant case, has not made a knowing and intelligent plea, as required both by Federal Rule of Criminal Procedure 11 and by the Constitution. *Id.*; *Apprendi*, 120 S.Ct. at 2365. When the defendant does not challenge the voluntariness of a guilty plea, as Hagan has done here, *Apprendi* affects the maximum sentence, just as it does in cases tried to a jury. *Id.*; *see also* Alan Ellis, Peter Goldberger, James H. Feldman, Jr. & Karen L. Landau, *Apprehending And Appreciating Apprendi*, 15-WTR Crim. Just. 16, 18 (2001) (hereafter "Ellis, *Apprehending and Appreciating*").

The omission of the essential element of amount of misapplied funds is fatal to Hagan's purported felony

conviction. Hagan, thus, can only stand convicted of the lesser offense with the lesser punishment associated therewith, a misdemeanor violation. *See Packnett v. United States Government*, 503 F.2d 949 (5th Cir. 1974); *United States v. Ciongoli*, 358 F.2d 439, 440 (3d Cir. 1966).

B. An *Apprendi* Violation Involving An Omission From A Federal Indictment Is Not Subject To A Finding Of Harmless Error.

The Fifth Circuit, in denying *Apprendi*'s application to the instant case, manufactured an excuse for the aforementioned Constitutional insufficiency by a hypothetical constructive amendment to the bill of information. Although the element essential for a felony charge was omitted, the Fifth Circuit conjured this fact from matters extraneous to the charging document. The result, a felony conviction and consummate sentence for Hagan, is contradictory to the well settled precedent of this Court and lower United States circuit courts.

Harmless error analysis does not countenance this result. An *Apprendi* defect involving a federal indictment as a matter of constitutional principle cannot be harmless. This constitutionally based maxim is the established law of the United States Courts of Appeals for the Second Circuit;[12] Fourth Circuit;[13] Fifth

---

[12] *Tran, supra*, 234 F.3d 798.

[13] *United States v. Cargill*, ___ F.3d ___, 2001 WL 1019312, 19-20 (4th Cir. Sept. 6, 2001); *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001).

Circuit;[14] Ninth Circuit;[15] and Tenth Circuit.[16] *See also* John K. Zwerling, *Comprendez Apprendi*, 38 Am. Crim. L. Rev. 309, 317-18 (2001) ("If the indictment fails to set forth an element of the offense, plain error is no longer a consideration."); King, *Apres Apprendi*, 12 Fed. Sent. R. 331.

Under these cases, unlike the trial context where the omission of an element from jury instructions may be harmless, *see, e.g., United States v. Slaughter*, 238 F.3d 580 (5th Cir. 2000), *reh'g and reh'g en banc denied*, 248 F.3d 1141 (5th Cir.), *cert. denied*, 121 S.Ct. 2015, 149 L.Ed.2d 1015 (2001), the omission of an element from a federal indictment is considered a constitutional violation not subject to a finding of harmless error. *See, e.g., Tran, supra*, 234 F.3d 798; *Baptiste, supra*, ___ F.3d ___, 2001 WL 1006712; *id.* at 14-22 (King, C.J., concurring); *Gonzalez, supra*, 259 F.3d 355. The different outcome in these cases is attributable to the type *Apprendi* error at issue.

Unlike *Baptiste, supra*, the indictment in *Slaughter, supra*, charged all the elements of the offense for which the defendant was convicted and sentenced. The court's analysis in *Slaughter* was a straightforward application of

---

[14] *United States v. Baptiste*, ___ F.3d ___, 2001 WL 1006712 (5th Cir. Aug. 31, 2001); *United States v. Smith*, ___ F.3d ___, 2001 WL 984691 (5th Cir. Aug. 28, 2001); *Longoria, supra*, 259 F.3d 363; *Gonzales, supra*, 259 F.3d 355; *Vasquez-Zamora, supra*, 253 F.3d 211.

[15] *United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *vacated and reh'g en banc granted*, ___ F.3d ___, 2001 WL 1091167 (9th Cir. Sept. 14, 2001); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

[16] *United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000).

Apprendi, consistent with controlling precedent on omission of an element from the "jury instruction." *See, Neder, supra*, 119 S.Ct. at 1834 (holding that jury instructions that erroneously omit an element of the offense are subject to harmless error analysis). Under *Neder*, the error is harmful only if "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 1838-39.

The Fifth Circuit's analysis in *Baptiste* is also a straightforward application of *Apprendi*, but, of course, is consistent with controlling precedent on omission of an element from the "indictment." Because the offense actually stated in the indictment in *Baptiste* carried a statutory maximum less than the sentence that was imposed, the defendant was entitled to be resentenced in accordance with the crime for which he had been charged and convicted. *See Baptiste*, 2001 WL 1006712, 12-13.[17]

---

[17] *See also, e.g., United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999) ("To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense."); *United States v. Fitzgerald*, 89 F.3d 218, 221 (5th Cir.), *cert. denied*, 519 U.S. 987, 117 S.Ct. 446, 136 L.Ed.2d 342 (1996) ("[I]f raised for the first time on appeal and the appellant does not assert prejudice, that is, if he had notice of the crime of which he stood accused, the indictment is sufficient unless it is so defective that by any reasonable construction, it fails to charge the offense for which the defendant is convicted."); *United States v. Outler*, 659 F.2d 1306, 1311 (5th Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 665 (1982) ("Unless every element of an offense appears in the indictment, it is impossible to assure the defendant that a grand jury properly determined probable cause of the offense.").

The fundamental principle applicable in assessing the sufficiency of an indictment is "notification." *Apprendi*, 120 S.Ct. at 2356; *United States v. Berrios-Centeno*, 250 F.3d 294, 297 (5th Cir. 2001), *petition for cert. filed* Jul. 24, 2001. "The Sixth Amendment requires, *inter alia*, that a defendant be fairly informed of the charges filed against him." *Id.* (citing *United States v. Gaytan*, 74 F.3d 545, 551 (5th Cir.), *cert. denied*, 519 U.S. 821, 117 S.Ct. 77, 136 L.Ed.2d 36, *cert. denied*, 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996)). "An indictment is intended to provide notice to the defendant that allows him to intelligently consider his defense or plea." *Apprendi*, 120 S.Ct. at 2356 & 2359 n. 10; *United States v. Angeles-Mascote*, 206 F.3d 529, 532 (5th Cir. 2000). Therefore, "[t]o be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense." *Apprendi*, 120 S.Ct. at 2362-63; *Cabrera-Teran*, 168 F.3d at 143 (indictment failing to allege defendant was "arrested," an element of the offense, invalid because facially deficient); *Angeles-Mascote*, 206 F.3d at 532 (stating that a defect in an indictment is not harmless when an essential element is not specified); *see also* Bibas, *Guilty Pleas*, 110 Yale L.J. at 1139-42.

If an offense is not charged, the district court, and therefore all subsequent courts considering the matter, lack jurisdiction to try, accept a guilty plea, convict, sentence a defendant for such offense not charged in the indictment, or affirm the foregoing. "A 'failure of the indictment to charge an offense may be treated as a jurisdictional' defect, . . . and an appellate court must notice such a flaw even if the issue was raised neither by

the district court nor on appeal." *Tran, supra,* 234 F.3d at 805-09; *Longoria, supra,* 259 F.3d at 365.

The Fifth Circuit in *Gonzalez, supra,* 259 F.3d 355, also explained that because of the jurisdictional "nature" of the error of omitting an essential element of the offense of conviction, evidence of the drug quantity at trial or the defendant's acknowledgment of the quantity was irrelevant and could not cure the grand jury's lack of notice of the quantity element (which was an element only because it was used to enhance the sentence). *Id.* at 360-1 n. 3. The *Gonzalez* court also pointed out that the fact that the grand jury did not pass upon the quantity factor did not mean that the conviction failed to charge any offense, but merely that it did not charge the aggravated offense. That is, the quantity omission from the indictment did not render the conviction deficient, but rather resulted in a sentencing error. *Id.* Thus, the court had jurisdiction, i.e., the authority, to sentence the defendant only under the offense as stated in the indictment, and not under an offense that required the additional element of drug quantity.

In Hagan's case, the essential element omitted was the amount of misapplied funds. Section 371 of Title 18, United States Code, provides in pertinent part:

> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The object of the conspiracy in Hagan's case is a violation of 18 U.S.C. § 656, which provides in relevant part that if

the amount misapplied does not exceed $1,000, the defendant shall not be imprisoned more than one year. Therefore, an essential element of the felony offense of willful misapplication of bank funds is that "the amount of funds misapplied was in excess of $1,000.00." Pattern Instruction 2.32 (18 U.S.C. § 656), *Fifth Circuit Pattern Jury Instructions (Criminal Cases)* (West 1999). The government failed to plead this element in the bill of information, thus violating Hagan's well settled Sixth Amendment right to a Constitutionally complete and self-contained indictment/bill of information.

Apprendi itself also supports the conclusion that the omission of an element from a federal indictment is considered a constitutional violation not subject to a finding of harmless error. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the statutory maximum penalty beyond the prescribed statutory maximum" is an element. *Apprendi*, 120 S.Ct. at 2362-63. It follows (1) that a defendant such as Apprendi, who is subject to a state prosecution, is entitled to have such facts submitted to a jury and proved beyond a reasonable doubt, and (2) that a defendant such as Hagan in this case, who is subject to federal prosecution, is entitled to those same rights and to the right to be tried and sentenced only upon an indictment by a grand jury.

Indeed, in the *Apprendi* opinion itself, the Court contrasted the state prosecution before it with the federal prosecution challenged in *Almendarez-Torres, supra*, 118 S.Ct. 1219. *See Apprendi*, 120 S.Ct. at 2355-56 n. 3. In *Almendarez-Torres*, the Court stated that if 18 U.S.C. § 1326(b)(2) "constitute[d] a separate crime, then the Government must write an indictment that mentions the

additional element." 118 S.Ct. at 1221. More importantly, the *Apprendi* Court explicitly adopted as its holding "the opinion that we expressed in [*Jones*, 119 S.Ct. 1215]." *Apprendi*, 120 S.Ct. at 2362. In *Jones*, a case involving a federal prosecution, the Court stated that the Fifth and Sixth Amendments require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 119 S.Ct. at 1224 n. 6 (emphasis added).[18] *See also United States v. Jones*, 194 F.3d 1178 (10th Cir. 1999), *vacated and remanded, Jones v. United States*, 530 U.S. 1271, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000), *opinion after remand, United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000) (the Supreme Court vacated and remanded for consideration in light of *Apprendi* where the indictment failed to allege quantity subjecting defendant to enhanced sentence yet defendant conceded government proved quantity at trial beyond a reasonable doubt; sentence vacated on remand). Hagan's purported felony conviction and sentence thus constitute a structural error that is per se unconstitutional. *See Neder, supra*, 119 S.Ct. 1827; *Sullivan, supra*, 113 S.Ct. 2078; *Hamling, supra*, 94 S.Ct. 2887.

Despite the sound reasoning and precedent supporting the majority view discussed above, a split has developed between the United States circuit courts over the applicability of harmless error to an *Apprendi* defect. The

---

[18] *See also Apprendi*, 120 S.Ct. at 2373-74 (Thomas, J., concurring) (emphasizing that indictments must contain all elements of the offense).

following United States Courts of Appeals have concluded that harmless error can excuse an *Apprendi* error concerning an indictment: First Circuit;[19] Sixth Circuit;[20] Seventh Circuit;[21] Eighth Circuit;[22] and Eleventh Circuit.[23]

In the face of the aforementioned grave constitutional errors, the Fifth Circuit would nonetheless have Hagan stand convicted of a felony crime, which under no fair and reasonable construction of the bill of information could have been charged. Such an extension of the bill of information is per se unconstitutional. The *Apprendi* rule must be applied to this case; Hagan cannot stand convicted of a felony when the essential element constituting this crime was not charged by the government. Similarly, the felony sentence imposed against him is per se unconstitutional and must be reversed.

---

[19] *Duarte, supra,* 246 F.3d 56.

[20] *United States v. Bates,* ___ F.3d ___, 2001 WL 1006240 (6th Cir. Aug. 21, 2001); *United States v. Stafford,* 258 F.3d 465 (6th Cir. 2001).

[21] *United States v. Booker,* 260 F.3d 820 (7th Cir. 2001).

[22] *United States v. Poulack,* 236 F.3d 932 (8th Cir. 2001), *reh'g and reh'g en banc denied, petition for cert. filed* June 8, 2001.

[23] *United States v. Pease,* 240 F.3d 938 (11th Cir. 2001), *petition for cert. filed* July 6, 2001.

C. *Apprendi* Requires That Before Restitution Orders Be Imposed, The Fact And Amount Of Loss Must Be Charged And Proved Beyond A Reasonable Doubt.

Apprendi holds that with the exception of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 120 S.Ct. at 2362-63. Because fines, restitution, and forfeitures are among the "penalt[ies]" imposed in criminal cases, "any fact" that increases those penalties must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt, as well. Indeed, many of the nineteenth century cases from which the constitutional holding of *Apprendi* is derived, themselves only involved differences in fines and other financial penalties, according to Justice Thomas's extensive review in his concurring opinion. *Id.* at 2368-76. Financial penalties, including restitution orders, are thus open to attack under *Apprendi*.

Sections 3663 and 3663A of Title 18, United States Code (18 U.S.C. §§ 3663 & 3663A), provide for sentences that include orders to pay restitution. Before these penalties may be imposed, the fact and amount of loss must be charged in the indictment and proved beyond a reasonable doubt. This did not occur in Hagan's case; therefore, the restitution order imposed is likewise per se unconstitutional and must be reversed. *See* Ellis, *Apprehending and Appreciating*, 15-WTR Crim. Just. at 22.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for writ of certiorari be granted, the opinion of the United States Court of Appeals for the Fifth Circuit be reversed, the judgment of the United States District Court for the Western District of Louisiana, Shreveport Division, be reversed, and this case be remanded to the district court for resentencing consistent with *Apprendi, supra*.

Respectfully submitted,

MICHAEL B. DONALD
Attorneys for Petitioner

Dated: October 3, 2001

TABLE OF CONTENTS

Page

Per Curiam Opinion from the United States Court of Appeals for the Fifth Circuit dated June 7, 2001 .....App. 1

Transcript of Sentencing Hearing before the United States District Court for the Western District of Louisiana, Shreveport Division, dated May 4, 2000.....App. 5

Presentence Investigation Report (Revised) dated April 24, 2000.....App. 18

Objections to Presentence Investigation Report dated April 19, 2000.....App. 37

Addendum to the Presentence Report dated May 2, 2000.....App. 45

Seconded Amended Judgment In A Criminal Case entered by the United States District Court for the Western District of Louisiana, Shreveport Division, dated December 4, 2000.....App. 66

Amended Judgment In A Criminal Case entered by the United States District Court for the Western District of Louisiana, Shreveport Division, dated May 15, 2000 .....App. 73

Judgment In A Criminal Case entered by the United States District Court for the Western District of Louisiana, Shreveport Division, dated May 8, 2000.....App. 80

Opinion on Petition for Rehearing and Rehearing En Banc dated July 6, 2001.....App. 87

TABLE OF CONTENTS – Continued

Page

UNITED STATES CONSTITUTION

U.S. Const. amend. V .....App. 89

U.S. Const. amend. VI .....App. 89

STATUTES

18 U.S.C. § 371 .....App. 90

18 U.S.C. § 656 .....App. 90

18 U.S.C. § 3663 .....App. 92

18 U.S.C. § 3663A .....App. 97

18 U.S.C. § 3664 .....App. 101

U.S. SENTENCING GUIDELINES

U.S.S.G. 2F1.1 & Application Notes .....App. 109

U.S.S.G. 5E1.1 & Application Notes .....App. 129

Bill of Information dated November 12, 1999. .App. 133

Transcript of Guilty Plea before the United States District Court for the Western District of Louisiana, Shreveport Division, dated November 12, 1999 .....App. 136

Rule 11 Package Prepared by the United States Attorney for the United States District Court for the Western District of Louisiana, Shreveport Division .....App. 155

Affidavit of Riley Hagan, III filed in connection with Objections to Presentence Investigation Report dated April 18, 2000 .....App. 168

TABLE OF CONTENTS – Continued

Page

Confidential Settlement Agreement between First American National Bank, operating as Deposit Guaranty National Bank, and Riley Hagan, III filed as attachment to Affidavit of Riley Hagan, III filed in connection with Objections to Presentence Investigation Report dated February 26, 1999 .....App. 179

Supplemental Affidavit of Riley Hagan, III filed in connection with Objections to Presentence Investigation Report dated May 3, 2000 .....App. 204

No. _____

In The

Supreme Court of the United States

RILEY HAGAN, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX OF DOCUMENTS FOR PETITION FOR WRIT OF CERTIORARI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31447
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RILEY HAGAN, III,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 99-CR-50095-ALL

(Filed Jun. 07, 2001)

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Riley Hagan, III, appeals his conviction and sentence for conspiracy to misapply bank funds, a violation of 18 U.S.C. §§ 371 and 656. He argues that his sentence is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the amount of misapplied funds and loss, essential elements of the offense of conviction, were

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

not charged in the bill of information and determined under a reasonable doubt standard. Hagan points out that if the amount of funds misapplied does not exceed $1,000, the predicate offense is a misdemeanor and the maximum term of imprisonment is one year. *See* 18 U.S.C. §§ 371, 656. However, Hagan admitted at the guilty-plea hearing that his actions caused a loss to the bank of $4.8 million and he was advised that the maximum possible sentence for his offense was five years of imprisonment and/or a fine of $1 million. He also acknowledged the maximum punishment of five years' imprisonment in his plea agreement. *See* 18 U.S.C. § 371. When the district court advises the defendant of the maximum possible penalty and when the defendant agrees with the Government's factual basis which sets out the amount of drugs which would be proved at trial, *Apprendi* is not violated. *See United States v. Salazar-Flores*, 238 F.3d 672, 673-74 (5th Cir. 2001); *see also United States v. Fort*, No. 00-10418, 2001 WL 388099, *6 (5th Cir. Apr. 17, 2001). The same reasoning applies to the amount of money lost pursuant to a scheme to defraud. Thus, the statutory maximum under the facts of this case is five years of imprisonment. As such, Hagan's sentence of 25 months does not run afoul of *Apprendi*.

Hagan argues that the district court clearly erred in calculating the loss to the victim bank from his check-kiting scheme. He asserts that a net loss calculation should have been used, thereby reducing the outstanding indebtedness by the amount the bank could reasonably have expected to recover from the assets securing that indebtedness, and by the $800,000 the bank received pursuant to his civil settlement with it. In a check-kiting case,

it is not the total of all checks used in the scheme ($14,182,500 in this case), but, rather, the amount of overdraft or loss when the scheme is discovered ($4.8 million in this case) that is used to determine the amount of loss. *See United States v. Frydenlund*, 990 F.2d 822, 826 & n.5 (5th Cir. 1993). It is inappropriate to reduce the amount of loss by subsequent settlement payments or other uncertain collateral held by the bank. *Id.* The district court did not clearly err in its loss calculation.

Hagan argues that no victim in this case suffered a loss compensable by restitution because pursuant to the confidential settlement agreement, his payment of settlement proceeds extinguished the underlying obligations. Hagan argues in the alternative that he was entitled to additional credits and/or offsets of $1.6 million but he fails to specify the source of the credits/offsets. He contends that the court erred by ordering his restitution order to be joint and several with his codefendants because it results in double recovery for the bank of the $862,000 credited to him but not to his codefendants. Hagan seeks remand on the restitution issue so that the court may apportion it to reflect the contribution of each codefendant to the bank's overall loss.

A civil settlement agreement does not preclude an award of restitution because restitution is primarily penal in nature. *See United States v. Sheinbaum*, 136 F.3d 443, 447-48 (5th Cir. 1998). Joint and several liability for restitution is authorized by statute. 18 U.S.C. § 3664(h). Nonetheless, pursuant to Hagan's civil settlement agreement with the bank, the bank will not obtain double recovery. Any such funds would be returnable to Hagan pursuant

to the bank's assignment to him of judgments obtained against his codefendants.

The district court did not abuse its discretion in awarding restitution in the amounts of $1,135,243 to the bank, and $2,847,000 to St. Paul Fire and Marine Insurance Company, to be paid jointly and severally by all codefendants including Hagan.

Hagan's motion to file supplemental record excerpts is GRANTED.

AFFIRMED; MOTION GRANTED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL DOCKET No. 99-50095-01
V.	:	Shreveport, Louisiana
RILEY HAGAN, III	:	May 4, 2000 9:00 a.m.

Transcript of Sentencing Hearing before the Honorable Donald E. Walter, United States District Judge.

(Filed Jun. 06, 2000)

APPEARANCES:

FOR THE GOVERNMENT:
AUSA Alexander Van Hook
AUSA Sonia P. Cassidy
U.S. Attorney's Office
300 Fannin Street,
Suite 3201
Shreveport, Louisiana 71101

FOR THE DEFENDANT:
Mr. Michael B. Donald
Barlow & Hardtner
Post Office Box 8
Shreveport, Louisiana
71161-0008

Mr. Joseph S. Cage, Jr.
Attorney at Law
3010 Knight Street, Suite 250
Shreveport, Louisiana 71105

Court Reporter: Marie Moran Runyon, RMR, CRR
Federal Official Court Reporter
300 Fannin Street, Room 4212
Shreveport, Louisiana 71101
Phone: (318) 222-9203

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

[2] (Court called to order, defendant present.).

THE COURT: Well, I can call the case for sentencing: United States versus Riley Hagan, Docket No. 99-50095. Ms. Cassidy is here for the Government, and who's going to speak for Mr. Hagan?

MR. CAGE: Well, either one of us, Your Honor.

THE COURT: Well, we're not going to tag team.

MR. CAGE: Well, there's really not going to be any speaking, unless there's some inquiry.

THE COURT: I thought you wanted some sort of hearing?

MR. CAGE: I'm sorry, Your Honor?

MR. DONALD: I believe, Your Honor, we're just going to submit the information and maybe just verify what we've already submitted is in the record.

THE COURT: And read.

MR. DONALD: Nothing else, Your Honor.

THE COURT: You don't want anything else?

MR. DONALD: No, sir.

THE COURT: Okay.

MS. CASSIDY: Your Honor, if I may, Mr. Van Hook is going to speak on behalf of the Government.

THE COURT: Okay, Ms. Cassidy.

Well, Mr. Cage or Mr. Donald –

Anything from the Government?

[3] MR. VAN HOOK: No, Your Honor. The only reason why the Government would put on additional evidence would be if the Court didn't think that the evidence and the argument we've submitted would be sufficient to sustain the presentence report.

THE COURT: I think it is.

Mr. Cage or Mr. Donald, if you and Mr. –

MR. DONALD: Judge –

THE COURT: – Hagan will come up. What?

MR. DONALD: We just wanted to verify that in the record are the sentencing memoranda and attached letters that were submitted.

THE COURT: And the filing this morning.

MR. DONALD: Well, over the last several weeks, anyway: the April 19 objection to presentence report –

THE COURT: Two forests' worth.

MR. DONALD: Yes, sir.

– the supporting memorandum, which included an affidavit from Mr. Hagan with attached exhibits; the transcript of his guilty plea; the supplemental affidavit of Mr. Hagan submitted yesterday, along with a summary exhibit of actual net loss calculation. And that's – if those are in the record, then we have –

THE COURT: Tell me, Mr. Donald, because I understand that we've discovered that some of the objections [4] you made are no longer legally binding.

MR. DONALD: No, sir. Some of the objections that were made in the initial submittal were withdrawn –

THE COURT: Oh, okay.

MR. DONALD: – pursuant to discussion with the Government.

THE COURT: All right. I guess the best way to do it is to say, first: Mr. Hagan, you and your lawyers went through this presentence report; is that correct.

THE DEFENDANT: Yes, sir that's correct.

THE COURT: And y'all have worked out whatever objections we're about to go through; is that correct?

THE DEFENDANT: Yes, Your Honor, I believe that's correct.

THE COURT: I'm sorry, you seem hesitant.

MR. DONALD: Well, there are two presentence reports. There was an original, Your Honor, that we filed some objections to and there was an amended –

THE COURT: Well, I only have one.

MR. DONALD: – one we received yesterday. And as to the amended we received yesterday, I think our objections that are on file cover that.

THE PROBATION OFFICER: Your Honor, the revisions were reference to some of the objections they made where we just corrected typos, et cetera.

[5] THE COURT: Oh, okay, there were typos, that sort of thing. Okay. Now, are we all reading from the same page?

You've gone through the presentence report and you and your attorney have made whatever objections there are to be made; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Have you got your presentence report with you, Mr. Donald, because that's what I'm going to work from.

Are we back on the objections, there being no objections by the Government? Are you looking at the same page I'm looking at?

MR. DONALD: The document entitled "Addendum to Presentence Report"?

THE COURT: Yes.

MR. DONALD: Yes, sir, I have that one.

THE COURT: And this is – I assume you've gone through this and you agree that the probation office has covered all of your objections from your filing?

MR. DONALD: Yes, sir, I do.

THE COURT: All right. The Objection No. 1, do you still insist on it?

MR. DONALD: It's a correction of the count charged, Your Honor, and the probation officer corrected that in the report, so I agree with his correction.

[6] THE COURT: Okay. And your Objection No. 2, do you still insist upon that?

MR. DONALD: The probation officer corrected the reference to other parties involved in this matter, so I agree with his correction, Your Honor.

THE COURT: All right. The Objection No. 3, is that what's still in effect?

MR. DONALD: Yes, sir, it is.

THE COURT: I'm going to overrule based on the Government's response. I think that it is absolutely correct. I note in particular the Government's sentence that your client's fraudulent conduct placed CNB or Deposit Guaranty, or whatever its present name is, in a situation they would never have bargained for.

The Objection No. 4?

MR. DONALD: Yes, sir, we still maintain that.

THE COURT: You still insist on standing by that one. I am going to again agree with the probation officer. I am going to give credit for the $800,000 settlement and for the $62,000 difference in the amount of the loss that you filed – this morning, Mr. Donald?

MR. DONALD: There was a supplemental affidavit filed by –

THE COURT: Right. It was $62,000, I think, off?

MR. DONALD: Yes, sir.

[7] THE COURT: So I'm going to remove $862,000 from the calculations.

THE PROBATION OFFICER: Your Honor, are you removing that from calculations for restitution purposes or guideline purposes?

THE COURT: For restitution purposes. It's not going to make any difference with the guideline, because the cutoff is at two and a half million. Even if I removed it, it still wouldn't have any effect. But I'm not removing it for guideline purposes.

MR. DONALD: For restitution purposes, Your Honor, is the Court considering the restitution order that was given against Mr. Cooke in that we have multiple defendants causing this single loss and we're not –

THE COURT: Certainly the bank is not going to profit. It's going to be in solido.

MR. DONALD: Okay, thank you.

THE COURT: I gather your Objection No. 5 is moot now; is that right?

MR. DONALD: Well, in that it references our prior arguments, Your Honor, I think I want to maintain the objection.

THE COURT: Okay. Okay. And the remaining objections – excuse me. That's not true.

Objections 6, 7 all are dependent on calculations [8] based on rulings I've just made, so I need not . . . , except to say they're overruled.

MR. DONALD: Yes, sir.

THE COURT: Your Objection No. 8, Mr. Donald, if you have something that shows me that restitution being ordered is not mandatory, you can find something that I haven't found.

MR. DONALD: It was simply the *Campbell* case, Your Honor, which deals with the court must take into account that which has been given to the victim in consideration or calculation of the restitution order and also must take into account the situation of the defendant in devising what a restitution order is going to take into account, and I think more than just $800,000 was given in connection with the restitution in this matter, because the settlement was a giving of much more in value than just the cash that was given.

THE COURT: Well, that's all I'm going to consider.

Objection No. 9 is overruled.

Objection 10, the same thing. That's what we just discussed.

MR. DONALD: And I'd just refer the Court to the *Campbell* case which we cited in our pleadings, Your Honor.

THE COURT: All right, sir, and that is noted.

And there aren't any reasons to warrant a downward departure. I'm sorry, Mr. Donald, I'm going to deny that.

[9] Is there anything both you and Mr. Cage want to say before I pronounce sentence?

MR. DONALD: No, Your Honor. We just want to make sure the record is complete and that's it.

THE COURT: Mr. Cage, anything you want to say?

MR. CAGE: Nothing, Your Honor.

THE COURT: Anything the Government wants to say?

MR. VAN HOOK: Yes, Your Honor. Just for the record, we'd like to note that we believe that the defendant's Objection No. 4 was addressing the amount of loss for the specific offense characteristics for sentencing. You said during that objection you would consider it for restitution purposes only. I just want to make that clear that –

THE COURT: I said I would consider the $862,000 for restitution purposes. The other doesn't really make any difference, because it has to drop to two and a half million before it –

MR. VAN HOOK: Yes, Your Honor. And for the $62,000, it's also the Government's position that the $62,000 was a cash collateral account that was not the type of – it was not the type of liquid, available deposit to be used to represent the loss. That money was pledged as security to the bank for other legitimate debts.

THE COURT: The Government's objection is noted.

MR. VAN HOOK: Thank you, Your Honor.

[10] THE COURT: Mr. Hagan, I've read every letter. Is there anything you have to say to me?

THE DEFENDANT: Thank you for your time, Your Honor, in reading all those letters. I hope that they indicate to the Court that – that my conduct in this case is not the kind of person I am, and I'm very sorry about what I did. I let myself get put into a conflict of interest situation that I thought I was strong enough to manage, but obviously I wasn't. And I always thought the bank was secure, but obviously it wasn't and it resulted in this disaster. And like I told the Court in my guilty plea, I had a choice to make, I made the wrong choice, nobody put a gun to my head, and I've lived regretting that decision every day of the last three years, and I'll continue to regret it for the rest of my life. And I'm just very sorry that it all happened.

THE COURT: I am, too, Mr. Hagan. It's a tragedy. I believe that you will use this to your benefit. I hope you will. It is the judgment of the Court that, under the Sentencing Reform Act, you are hereby committed to the custody of the Bureau of Prisons for a term of 33 months, the minimum under the guidelines. Upon release from imprisonment, you are placed on supervised release for a period of three years. You are to report to the custody of the Bureau of Prisons –

How long, Mr. Donald?

MR. DONALD: I noted that there was a trial [11] scheduled that Mr. Hagan is going to be a witness in,

Your Honor, that I think has been rescheduled to sometime in July, and I don't know what the Government's –

THE COURT: Just tell me what you want.

MR. DONALD: We would like to report after he testifies in that trial.

THE COURT: Give me a date.

MR. DONALD: It's scheduled on the 24th, so how about August 1 or August 15?

THE COURT: What's the Monday closest to August 1, somebody with a calendar?

MR. VAN HOOK: July 31, Your Honor.

THE COURT: Okay.

MR. CAGE: Your Honor, if – well, obviously we don't know how long the trial of Mr. Labarba will last.

THE COURT: If additional time is needed, you can always come back.

MR. CAGE: Thank you.

THE COURT: All right. Well, in any event, when you're released from imprisonment, you're to report to the probation office in the district to which you are released. While on supervised release, you're not to commit another federal, state or local crime, and the usual conditions apply. You're to disclose, as a special condition, your financial – any financial information requested by the [12] probation office. You have to pay a $100 assessment to the Crime Victim Fund. I'm not going to order a fine; there's no point to it. You are, however,

ordered to pay jointly and severally restitution to Deposit Guaranty or its successor in the amount of $1,135,243.53 and to St. Paul the amount of $2,847,000. For the $862-, if by some chance this is paid, you're to get credit for that, not your joint and several liability codebtors. You're to make restitution in monthly installments at a rate of no less than 20 percent of your gross income, to commence – how, Mr. – no – 30 days after you are released from custody. I'm not going to order any interest; no ability to pay that. Drug testing is waived, suspended.

You have a right to appeal. Should you appeal, the Clerk is directed to send a copy of the presentence report and its attachments under seal to the Fifth Circuit. Okay?

Thank you, Mr. Donald. Thank you, Mr. Cage.

MR. DONALD: Thank you, Your Honor.

THE COURT: If further time is needed, come to me. Okay?

I forgot to say that. You're to report by 1 o'clock on July 31 at a prison designated by the Marshal Service. You can report sooner, if you wish, or you can report that day to the Marshal Service. Okay?

THE DEFENDANT: Yes, sir.

[13] THE COURT: All right. Anything else?

(No response.)

Okay. Court is in recess until 10:30. (Proceedings concluded at 9:20 a.m.)

[14] CERTIFICATE

I, Marie Moran Runyon, Official Court Reporter, do hereby certify that the foregoing pages numbered 1 through 13 do constitute a true and correct record of proceedings had in said Sentencing Hearing to the best of my ability and understanding.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Subscribed and sworn to this 5th day of June, 2000.

/s/ Marie Moran Runyon
Marie Moran Runyon, RMR, CRR
Federal Official Court Reporter
300 Fannin Street, Suite 4212
Shreveport, Louisiana 71101
Phone: (318) 222-9203

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	**PRESENTENCE INVESTIGATION REPORT**
VS.	
RILEY HAGAN, III	**Docket No.: 99-50095-01**

Prepared For: **The Honorable Donald E. Walter**
United States District Judge

Prepared By: **Jon W. Novak**
United States Probation Officer
(318) 676-3295

Assistant U. S. Attorney
Sonia Cassidy
300 Fannin Street,
Suite 3201
Shreveport, LA 71101
(318) 676-3491

Defense Counsel
Joseph S. Cage, Jr.
3010 Knight Street,
Suite 250
Shreveport, Louisiana
71105
(318) 219-3425

Sentence Date: February 10, 2000, at 1:15 p.m.

Offense: Counts One: 18 U.S.C. § 371 – Conspiracy to Misapply Bank Fraud – (5 years/$1,000,000 fine), a Class D Felony.

Release Status: Released on a recognizance bond at his initial appearance on November 12, 1999, without supervision.

Detainers: None

Codefendants: None

Related Cases: John R. Cooke, II, Docket No. 99-50089-01
Jerry G. LaBarbe. Docket No. 99-50103-01
Richard M. Plato, Docket No. 99-50103-02

Date Report Prepared: January 20, 2000
Date Report Revised: April 24, 2000

Identifying Data:

Birth Name: Riley Hagan, III

Date of Birth: July 4, 1964

Age: 35

Race: White, Non-Hispanic

Sex: Male

SSN No: 428-31-1125

FBI No: 212372MB8

USM No: 10457-035

Other ID No: LA Driver's License No. 6343937

Education: College Graduate

Dependents: One

Citizenship: U.S.A.

Legal Address: 8601 Millicent Way, Apt. #125
Shreveport, LA 71115

Telephone Number: (318) 797-5798

Aliases: None.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On November 12, 1999, a single count Bill of Information under Docket No. 99-50095-01 was filed against the defendant, **Riley Hagan, III**, charging him with a single count of conspiracy to misapply bank funds beginning some time in 1997 and continuing up to or on June 20, 1997. This is a violation of 18 U.S.C. §371.

2. On November 12, 1999, the defendant, with counsel representation appeared in Federal Court, Shreveport, Louisiana, and pled guilty to the single count Bill of Information. There is a written plea agreement in effect. Sentencing was set for February 10, 2000, at 1:15 p.m.

3. In a related case, on September 17, 1999, John R. Cooke, pled guilty to a single count Bill of Information charging him with Bank Fraud, a violation of 18 U.S.C. §1344 and 18 U.S.C. §2. On December 16, 1999, Cooke was sentenced to thirty-six months imprisonment. Also on February 25, 2000, Richard M. Plato pled guilty to Count 4, Bank Fraud, and is due to be sentenced on June 1, 2000 at 1:15 p.m. before Honorable Donald E. Walter. Jerry G. LaBarba, another codefendant in this case, is scheduled to go to trial on June 5, 2000.

The Offense Conduct

4. This offense involves Padre Trading Company, which was incorporated in Texas in April 1996. James G. "Jerry" LaBarba, Sr., was the President of Padre Trading Company and John R. Cooke, Vice President of Marketing. The history of this company actually begins in 1995 and 1996. A company then

known as M & S Petroleum was operated by individuals named Donald A. Mullins, Jerry LaBarba, Sr. and John Cooke. In 1995 and 1996, this company operated a refinery in Vicksburg, Mississippi.

5. Jerry LaBarba, Sr., had a previous banking relationship with the defendant, **Riley Hagan, III**. The relationship developed when Hagan was employed at Hibernia Bank in Texas. In 1996, **Riley Hagan** was Senior Vice President at Commercial National Bank's (CNB) Energy Department.

6. **Hagan**, as a CNB employee, wrote up a loan proposal for M & S Petroleum around January or February 1996. One loan was for $850,000 and was to provide funds to buy property in Channelview, Texas from North American Oil Recovery, a company owned by LaBarba. The other loan was a $400,000 working capital line of credit. The loan proposal indicated that M & S Petroleum had potential to make a lot of money. Actually, and possibly unbeknown to CNB, M & S Petroleum had been told by the Mississippi Department of Environmental Quality to cease and desist operations until necessary permits were in place at that refinery. M & S closed their operation in Vicksburg and moved their operation to a refinery in Lisbon, Louisiana. The name of the company was changed to Padre Trading Company and **Hagan** explained to CNB management that it was necessary to restyle the loan in the name of Padre Trading Company, Incorporated, instead of M & S in order to insulate the owners of M & S from unforeseen liability arising from the operation of the refinery. Eventually, the two loans totaling $1,250,000 became the responsibility of Padre Trading Company.

7. In November 1996, Padre Trading Company applied at CNB for a $2,325,000 line of credit to enable Padre

to purchase crude oil as feed stock to be refined in Lisbon, Louisiana. The credit was set up as a $2,325,000 letter of credit from CNB in favor of Falco S & D, Incorporated. Padre Trading Company was attempting to purchase oil taken out of the bottom of tanks and reprocess it as fuel oil and other petroleum products. They bought oil to be reprocessed from Falco S & D, refined it and sold it to the company known as Davison Petroleum Company. **Hagan** referred to this setup as "back to back" contracts and believed the company would be profitable. However, due to the extensive cost of operating a refinery, Padre Trading Company, who had borrowed money from CNB and was extended a line of credit by CNB, also borrowed money from Falco S & D, Davison Petroleum and Ames Financial. By the spring of 1997, Padre Trading Company did not have working capital to run the refinery.

8. In April 1997, Padre Trading Company borrowed $1,083,000 from Davison Petroleum. In May, 1997, Padre Trading Company borrowed $803,694.44 and then $805,541.67 from Davison Petroleum. In all three instances, **Hagan**, acting without authority from CNB, but purportedly on behalf of CNB, issued three letters guaranteeing payment of post dated checks written by Padre Trading Company to Davison for the above amounts. Post-dated checks were delivered to Davison to hold until the date noted on the checks came due at which time Davison deposited the checks into its account.

9. In order to generate cash to pay off loans coming due, in the Spring of 1997, Padre developed a scheme to create funds. The scheme involved depositing checks that were insufficient or on closed accounts. With the assistance of **Hagan**, CNB would give immediate credit on checks deposited into

Padre's account. Padre would then write checks off of funds placed in their account from these insufficient checks. These funds would then be used pay off other loans before the bad checks could be charged back against Padre's account. Also, as one bad check was being charged back against the Padre account, another bad check would be written and deposited to cover the charged back check and to provide additional funds with which Padre could operate. From April 29, 1997, through June 13, 1997, Padre deposited a series of checks which were returned for the following reasons, insufficient funds, account closed and refer to maker for uncollected funds. The makers of these checks were Tri-Mar Corporation (whose checks were signed by John Cooke), LaBarba and an attorney named Richard Plato. Except for the first check, these checks were deposited so that at one point when one check was being returned and charged back against the Padre account, a new check, which ultimately turned out to be insufficient, was deposited to cover the overdraft which would have been created by the charge back.

10. The following is a synopsis of the fourteen insufficient funds checks written and deposited in the Padre Trading account at CNB. On April 29, 1997, a TriMar Corporation check was written for $1,300,000 and signed by John Cooke, Jr.. Other checks written and deposited include, two James G. LaBarba checks written on his personal account. Check #302 deposited on May 5, 1997, in the amount of $275,000 and check #304 in the amount of $1,815,000 deposited on May 12, 1997. John Cooke, Jr. wrote and deposited two more checks on the TriMar Corporation account. The first check was written in the amount of $1,265,000 on May 22, 1997, and the second check was written in the amount of $2,500,000 on June 3,

1997. On June 6, 1997, Richard Plato, a Houston attorney convicted of Bank Fraud in federal court, for whose connection to Padre is unknown, deposited six personal checks into the Padre account, totaling $3,192,500. On June 13, 1997, Richard Plato, deposited three more personal checks into the Padre Trading account, totaling $5,100,000. The total amount of insufficient funds checks written and deposited was $14,182,500. The money actually taken by Padre and used for operating capital as a result of this scheme was $4,844,243.53. It was learned that **Hagan** had planned to take a position with Padre Trading Company.

Victim Impact

11. Deposit Guaranty Bank, formerly known as CNB, indicated that their loss from criminal conduct is $4,844,243.53. This loss is from the check kiting scheme and is the amount of loss for restitution purposes. Deposit Guaranty made claim with their bond company, the St. Paul Mercury Insurance Company. The claim totaled $6,611,880.30. This claim included monies lost on draws made on letters of credit issued by CNB based on representations of Padre that operating the refinery would repay Padre's debt, as well as cover the losses due to the check kiting. The loss from the check kiting scheme equals 73% of the total loss suffered by Deposit Guaranty.

12. St. Paul Mercury Insurance Company reimbursed Deposit Guaranty $3.9 million. Seventy three percent (73%) of 3.9 million equals $2,847,000. Since 73% equals the amount attached to criminal conduct, $2,847,000 of the 3.9 million paid to Deposit Guaranty by St. Paul is for criminal acts arising from this offense.

13. Therefore, if restitution is ordered, St. Paul should receive $2,847,000. Deposit Guaranty should receive the remaining $1,997,243.53. Both parties (Deposit Guaranty and St. Paul Mercury Insurance Company) have an agreement as to how recovery is to be divided and both parties have indicated that they will abide by this agreement. According to this agreement, it appears that St. Paul may have no claim to amounts recovered. However, both parties are researching to see if this claim extends to a criminal forum as well as a civil forum and both parties agree that Deposit Guaranty will be paid restitution in full first.

Adjustment for Obstruction of Justice

14. There is no information suggesting the defendant obstructed justice regarding the conspiracy to misapply bank funds.

Adjustment for Acceptance of Responsibility

15. The defendant has accepted responsibility for his involvement in the offense and will receive benefit for an adjustment in this area.

Offense Level Computations

16. The Guidelines Manual effective November 1, 1998, was used in the guideline calculation. The U. S. Sentencing Commission has advised it will not publish a Guideline Manual for 1999. Therefore, the Guideline Manual effective November 1, 1998, remains effective for all offenses committed after November 1, 1998, and/or sentenced after November 1, 1999.

17. Count one charges the defendant with a violation of 18 U.S.C. §371, Conspiracy to Misapply Bank Funds,

which is addressed at U.S.S.G. §2X1.1(a). This guideline states the base offense level from the guideline for the substantiative offense plus any adjustments from such guidelines is to be used to determine the offense level. U.S.S.G. §2X1.1(a).

18. The substantiative offense in this case is Misapplication of Bank Funds which is addressed at U.S.S.G. §2F1.1.

19. **Base Offense Level:** The guideline for 18 U.S.C. §1344 is U.S.S.G. §2F1.1. The base offense level is six (6). U.S.S.G. § 2F1.1(a). 6

20. **Specific Offense Characteristic:** According to Deposit Guaranty, formerly Commercial National Bank, the loss as a result of the check kiting scheme is $4,844,243.57. Losses greater than $2,500,000 but $5,000,000 or less results in thirteen level increase in the base offense level. U.S.S.G. §2F1.1(b)(1)(N). 13

21. If the offense involved more than minimal planning, there is a two level increase. Repeated acts by guideline definition are indicative of more than minimal planning. Also, more than minimal planning is deemed present in cases where there is more planning than is typical for commission of the offense in a simple form. In this case there were 14 checks written during this check kiting scheme. This is indicative of more than minimal planning. Therefore a two point increase is listed. U.S.S.G. §2FL1(b)(2)(A). 2

22. **Victim-Related Adjustments:** None. 0

23. **Adjustments for Role in the Offense:** At the time the offense occurred, Riley Hagan, III, was the Senior Vice President in charge of the Energy Department. On at least twelve occasions, Padre with the assistance of Hagan was given immediate credit on checks deposited into their CNB account. Padre then would write checks off the funds placed in their account from these insufficient checks. Therefore, since the defendant abused a position of private trust in a manner that significantly facilitated the commission of the offense, a two level increase is listed. U.S.S.G. §3B1.3. 2

24. **Adjustment for Obstruction of Justice:** None. 0

25. **Adjusted Offense Level (Subtotal):** 23

26. **Adjustment for Acceptance of Responsibility:** The defendant pled guilty in a timely fashion to the offense of Misapplication of Bank Funds and accepts responsibility for this conduct. Therefore, he will receive a three level reduction pursuant to U.S.S.G. §3E1.1(a) & (b). -3

27. **Adjusted Offense Level:** 20

28. **Chapter Four Enhancements:** None. 0

29. **Total Offense Level:** 20

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

30. None.

Adult Criminal Convictions

31. None known.

Criminal History Computation

32. As the defendant does not have a criminal history there are no criminal history points. This establishes a Criminal History Category of I. U.S.S.G. Chapter 5, Part A.

Other Criminal Conduct

33. None known.

Pending Charges

34. None known.

Other Arrests

35. None known.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

36. On July 4, 1964, Riley Hagan, III was born to the legal union of Riley Hagan, Jr. and Mary Lea Hagan. He is the oldest of two children born to this union and he grew up in Jackson, Mississippi. His father supported the family working in the oil and gas business and his mother was a homemaker. His brother, Bradley Hagan, is a school teacher and resides with the defendant's mother in Jackson, Mississippi.

37. Riley Hagan, III, married Terry Lynn Brumfield in Jackson, Mississippi, on July 6, 1991. The defendant's wife is employed as a computer trainer with

Venture Training Solutions. There is one child as a result of this union. She is Allison Hagan, age 6, who lives with the defendant and his wife and attends kindergarten at Southfield Elementary School. Currently the marriage remains intact. The defendant and his family reside at 8601 Millicent Way, Apt. #125, Shreveport, Louisiana.

Physical Condition

38. The defendant is 6 feet tall and weighs 180 pounds. He has brown hair and blue eyes. He has a surgical scar from an appendectomy and gall bladder surgery. He states that he is in good health.

Mental and Emotional Health

39. The defendant stated he has never been seen by mental health professionals and described his overall mental and emotional health as good. There is no evidence to suggest otherwise.

Substance Abuse

40. Hagan advised that in the eighth grade he experimented with marijuana once or twice. He states that he occasionally drinks wine with dinner and has an occasional beer and scotch. He does not feel that he has a drug or alcohol problem.

Education and Vocational Skills

41. The defendant claims attending Riverside Elementary School in the first grade in Shreveport, Louisiana, then attending McLeod Elementary School, Jackson Academy, Jackson Prep High School, all in Jackson, Mississippi. He attended college at Louisiana Tech University in Ruston, Louisiana.

42. The defendant claimed that he graduated in the top ten percent from the top 10% of his high school

class. His college transcript reveals that he completed requirements for a Bachelor of Science in Petroleum Engineering on May 24, 1986, and that he graduated Cum Laude with an overall GPA of 3. 335.

Employment Record

43. Currently the defendant is unemployed. He claims he attempted to start a business called Malachi Jets in April 1998. The objective of this business was to purchase jets and sell time shares. This business wasn't successful and the business ceased operations in about November 1998.

44. From November 4, 1991, until July 15, 1997, Riley Hagan, III was employed with Commercial National Bank, which is now known as Deposit Guaranty. Hagan, III started as the Energy Loan Manager earning $73,000 per year. He became Vice President and Manager of the Energy Department and then in January 1997 was promoted to Senior Vice President in charge of the Energy Department. He received yearly merit raises and was earning $87,750 at the time his employment was terminated on July 15, 1997. According to a final performance appraisal, Hagan, III was terminated due to several instances of conflict of interests that were not disclosed to the Ethics Committee and Hagan, III did not follow instructions involving a problem account which resulted in a large loss to the bank. The problem account described in the performance appraisal is the account which ultimately landed Hagan in Federal Court.

45. From 1988 to 1991, Hagan worked with Hibernia Bank. From mid-1988 until 1990, he worked in the New Orleans, Louisiana office. He started as the Assistant Vice President in the Energy Department at the inception of his employment he was earning

$3,500 per month. Prior to his transfer to the Hibernia Bank in Houston, Texas, he was earning $45,000 per year. In 1991, he was transferred to the Houston Hibernia Bank where he was Vice President and Manager of the Energy Department. He left this position to take the job with CNB and was earning about $50,000 when he left.

46. From 1986 to 1988 Hagan worked with Exxon in Houston, Texas, as a Petroleum Engineer. He earned $33,800 per year at the start of this employment and was earning $35,000 per year when he left to go to work at Hibernia Bank.

Financial Condition: Ability to Pay

47. The defendant submitted a financial statement and supporting documentation for the following financial profile. It is noted that the assets are jointly owned and the amount listed in the report reflects one-half of the total assets.

ASSETS

Cash

Checking (Hibernia)	$400.00
Savings (Hibernia)	35,500.00
Checking (Deposit Guaranty)	$650.00
IRA (Morgan Keegan)	58,000.00
Dale Guess Minerals	5,000.00

UNENCUMBERED ASSETS

Furniture	$2,500.00
TOTAL ASSETS	**$102,050.00**

Unsecured Debts

Visa	$8,000.00
Hibernia Bank	38,000.00
Estate of Riley Hagan, Jr.	836,700.00

TOTAL UNSECURED DEBTS	**$899,700.00**
NET WORTH	**<$797,650.00>**
Monthly Income	
Spouse's earnings per month	$1,500.00
Net profit from business/interests	500.00
Oil & Gas revenues	70.00
TOTAL INCOME	**$2,070.00**
Necessary Monthly Expenses	
Rent	$625.00
Electricity	100.00
Phone	50.00
Groceries/Supplies	400.00
Auto Insurance	100.00
Health Insurance	100.00
Life Insurance	100.00
Minimum Installment payments	5,239.00
Transportation	400.00
Medical	100.00
Clothing	300.00
TOTAL NECESSARY EXPENSES	**$7,514.00**
NET MONTHLY CASH FLOW	**<$5,444.00>**

48. The defendant's total income for 1996 was $67,147. His total income for 1997 was $122,131. The increase in income from 1996 is attributable to a deferred compensation plan given to the subject after he resigned from his position at Commercial National Bank. In 1998, the defendant's total income was <$128,427> and is due to business income and capital gains/losses in the amount of $159,394.

49. The debt attributable to the estate of Riley Hagan, Jr. is a result of a settlement between Riley Hagan and Deposit Guaranty National Bank in the amount of $800,000.

50. Further, the negative monthly cash flow listed above is supplemented by the defendant dipping into his savings each month. He advises that there is about $60,000 in cash remaining in this fund and it will be depleted in approximately a one year period.

51. Based on the above information the defendant may not be able to pay a fine. Restitution must be ordered in this case.

PART D. SENTENCING OPTIONS

Custody

52. **Statutory Provisions**: The statutory term of imprisonment for this offense, a Class D Felony, is five (5) years pursuant to 18 U.S.C. §371.

53. **Guideline Provisions**: Based on a total offense level of twenty (20) and a criminal history category of I, the guideline range for imprisonment range is 33 to 41 months.

54. Since the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment. U.S.S.G. §5C1.1(f).

Impact of Plea Agreement

55. None.

Supervised Release

56. **Statutory Provisions**: The authorized term of supervised release for a Class D felony is not more than three (3) years. 18 U.S.C. §3583(b)(2).

57. **Guideline Provisions**: Pursuant to U.S.S.G. §5D1.1(a) the Court shall order a term of supervised release. The guideline range for a term of supervised

release is at least two (2), but not more than three (3) years, for a Class D felony. U.S.S.G. §5D1.2(a)(2).

Probation

58. **Statutory Provisions**: The defendant is eligible for probation by statute since this is a Class D felony. 18 U.S.C. § 3561(a).

59. **Guideline Provisions**: The defendant is not eligible for probation by guidelines. U.S.S.G. § 5B1.1 comment (2).

Fines

60. **Statutory Provisions**: The maximum fine is $1,000,000. 18 U.S.C. § 311.

61. A special assessment of $100 is mandatory. 18 U.S.C. § 3013(a)(2)(A).

62. **Guideline Provisions**: The fine range for the instant offense is from $7,500 to $75,000, pursuant to U.S.S.G. §§5E1.2(c)(1), (2), and (3).

63. In determining the amount of the fine, the Court shall consider the expected costs to the Government of any imprisonment, probation, or supervised release, pursuant to U.S.S.G. § 5E1.2(d)(7). The most recent advisory from the Administrative Office of the United States Courts, dated April 14, 1999, suggests a monthly cost of $1,826.99 to be used for imprisonment, a monthly cost of $1,326.78 for community confinement and a monthly cost of $253.29 for supervision.

Restitution

64. **Statutory Provisions**: Not withstanding any other provision of the law, when sentencing a defendant convicted of an offense in which an identifiable victim or victims have suffered a pecuniary loss, the

court shall order, in addition or in lieu of any other penalty authorized by law that the defendant make restitution to the victim of the offense. 18 U.S.C. §3663(a)(1) and 18 U.S.C. §3664.

65. **Guideline Provisions**: The court shall enter an order of restitution since it is authorized under 18 U.S.C. §§3663, 3663(a) and 3664. U.S.S.G. §5E1.1(a)(1).

66. Deposit Guaranty is entitled to $1,997,243.53. If restitution is ordered it can be mailed to:

Deposit Guaranty National Bank
Attention: Frank Meigs
One Deposit Guaranty Plaza
P. O. Box 1200
Jackson, Mississippi 39215

67. St. Paul Mercury Insurance Company may be entitled to $2,847,000. St. Paul has indicated that if their agreement with Deposit Guaranty does not entitle them to restitution, they will forward restitution to Deposit Guaranty. If it is determined that St. Paul is entitled to restitution it can be mailed to:

St. Paul Fire and Marine Insurance Company
Attention: Marvin Alexander
385 Washington Street
St. Paul, Minnesota 55102

PART E. FACTORS THAT MAY WARRANT DEPARTURE

68. The probation officer has no information concerning the offense or the offender which would warrant a departure from the prescribed sentencing guidelines.

Respectfully submitted,

ED HARRELL
Chief U. S. Probation Officer

by /s/ Jon W. Novak
JON W. NOVAK
U.S. Probation Officer

Reviewed:

/s/ Thomas A. Goleman 5-2-00
THOMAS A. GOLEMAN Date
Supervising U. S. Probation Officer

JWN:ldg

BARLOW AND HARDTNER L.C.
ATTORNEYS AT LAW
TENTH FLOOR LOUISIANA TOWER
401 EDWARDS STREET
SHREVEPORT, LOUISIANA 71101-5512
MAILING ADDRESS
POST OFFICE BOX 8
71161-0008

April 19, 2000

[Names Omitted In Printing]

Mr. Jon W. Novak
U.S. Probation Officer
United States District Court
Office of the Probation Officer
Western District of Louisiana
U.S. Courthouse, Suite 2022
300 Fannin Street
Shreveport, LA 71101-3082

RE: United States of America vs. Riley Hagan, III, Number 99-CV-50095-01, United States District Court, Western District of Louisiana, Shreveport Division (Our File No. 99-0439)

Dear Mr. Novak:

I am in receipt of the Presentence Report regarding my client, Riley Hagan, III. I am requesting by this letter that the Report be changed to reflect the following objections:

1. Page 1. Offense, Para. 5: Mr. Hagan was not charged with Conspiracy to Commit Bank Fraud. He was charged and pled guilty to a single count of Conspiracy to Misapply Bank Funds. This change should be made throughout the Presentence Report.

2. Page 1. Related Cases, Para. 9: Additional related cases include the guilty plea of Richard M. Plato, Docket No. 9950103-02, and Jerry G. LaBarba, Docket No. 9950103-01, which is currently scheduled for trial beginning June 5, 2000.

3. Page 5. Part A. Victim Impact, Para. (11)-(13): These paragraphs should be amended to provide a full recitation of the facts.

   First, after the overdraft situation became apparent, and after Mr. Hagan was relieved from his responsibilities as the bank officer with chief responsibility for the Padre account, Deposit Guaranty entered into no less than three separate workout agreements with Padre, LaBarba, Cooke, and Plato. Although varying in terms, each workout was designed to allow the refinery to perform as intended or to give time for a deal with third-party investors to close. The first workout was entered on June 30, 1997, and consolidated all Padre's debt with Deposit Guaranty, including the amount of the overdraft, into a single note for approximately $5 million. This Note, as was the overdraft amount, was fully secured and collateralized under the Credit Agreement. In fact, the amount of the overdraft was not only collateralized by virtue of the workout documents, but was secured from inception as an obligation under the original Credit Agreement, as well as the subsequent Amendments. The second workout was executed on July 18, 1997, and

provided that (1) certain qualifying receivables would count toward Padre's payment obligation, (2) a limited letter of credit would be made available to Padre for short term operating capital, including the acquisition of feed stock, and (3) Padre would liquidate inventories at fair market prices. The third workout was entered on August 8, 1997, and established, in addition to continuing the above conditions, a weekly payment schedule.

Although the bank had the right to immediately seize and liquidate Padre's assets, Deposit Guaranty, independent of Mr. Hagan, chose the route of giving Padre, LaBarba, and Cooke additional opportunity to make a success of the refinery operation. This was manifested through the extension of additional credit to Padre for feed stock and other operating capital. Despite this forebearance, Deposit Guaranty nonetheless "tightened up the screws" on Padre's operations, affixing itself in a clear oversight, if not control, position. This included requiring the retention of an independent consultant, Roddy Engineering Services, Inc., to oversee refinery operations and advise the bank. Deposit Guaranty also confirmed through the workout documents the full collateralization of the overdrafts under the Credit Agreements.

Second, this paragraph should also be amended to include a description of the collateral securing the loss from the insufficient funds checks. At the time Mr. Hagan's employment was terminated there were in

excess of 200,000 barrels of crude and various product at the Padre Refinery and other storage locations valued at approximately $4.3 million securing the overdraft checks. Other collateral was also available, including real estate and funds on deposit in other Padre accounts at the bank. Mr. Hagan is entitled to an offset for the amount of secured collateral existing to offset the ultimate loss.

Finally, On February 25, 1999, Deposit Guaranty National Bank, formerly CNB, voluntarily entered into an agreement with Mr. Hagan settling all claims and causes of action it had against him, specifically any concerning his involvement or actions in connection with the Padre account, for a cash payment of $800,000.00. As part of this agreement, Deposit Guaranty Bank assigned and conveyed to Mr. Hagan its civil judgments against James G. LaBarba, Sr., John R. Cooke, Richard Plato, Padre Trading Company, Inc., and Trimar Corp. In addition, Deposit Guaranty National Bank agreed to indemnify and hold Mr. Hagan harmless from and against any and all demands, claims, actions, causes of action, judgments, liabilities, losses, and expenses based upon or arising out of the facts underlying this case, including, but not limited to, any demands or claims that might be asserted against Mr. Hagan by Deposit Guaranty National Bank, its parents, affiliates, and subsidiaries, and St. Paul Mercury Insurance Company or any other insurance or bonding company for any loss suffered. This settlement, which

was fully funded, established the amount of loss from the bank's perspective.

4. Page 6. Part A. Specific Offense Characteristics, Para. (20): This paragraph should be amended to reflect the objections made to Paragraphs (11) through (13) above. The calculation of loss attributable to Mr. Hagan should be a determination of "net loss" - that is the total amount of overdraft less the value of any collateral pledged to secure the amount owed. U.S.S.G. §2F1.1. This calculation must also consider the February 25, 1999, Settlement Agreement between Deposit Guaranty and Mr. Hagan. Considering both the value of available collateral and the settlement proceeds paid by Mr. Hagan, there should be no adjustment to the base offense level for "specific offense characteristic."

5. Page 6. Part A. Adjusted Offense Level (Subtotal), Para. (25): Paragraph 25 should be amended to reflect the objections made to paragraph (20) above. As a result, the adjusted offense level (subtotal) computation should be 10.

6. Page 6. Part A. Adjusted Offense Level, Para. (27): Paragraph 27 should be amended to reflect the objections made to paragraph (25) above. As a result, the adjusted offense level computation should be 7.

7. Page 6. Part A. Total Offense Level, Para. (29): Paragraph 29 should be amended to reflect the objections made to paragraph (27) above. As a result, the total offense level computation should be 7.

8. Page 10. Part C. Financial Condition: Ability to pay, Para. (51): This paragraph should be amended to reflect that restitution is not mandatory without consideration of relevant factors, and may properly not be imposed or may be adjusted based upon ability to pay.

9. Page 11. Part D. Guideline Provisions, Para. (53): Based on the objections made above, it is submitted that Mr. Hagan's base offense level of 6, together with adjustments for acceptance of responsibility, results in a guideline imprisonment range of 0-6 months.

10. Page 12. Part D. Restitution, Para. (64)-(67): These paragraphs should be amended to reflect that restitution is not mandatory without consideration of relevant factors, including ability to pay. The "Financial Condition: Ability to Pay" section of the presentence report clearly shows Mr. Hagan's inability to pay restitution. Moreover, the Court may not order restitution to a victim who has already received compensation for its loss. Here, Deposit Guaranty has been fully compensated for its loss by its own acknowledgment in the February 25, 1999, Settlement Agreement between the bank and Mr. Hagan, as well as through payments from a third-party, St. Paul Fire and Marine Insurance Company. St. Paul, through contract, waived its entitlement to restitution and would be obligated to forward any restitution payment to Deposit Guaranty. This would result either in a double recovery and unreasonable windfall

for the bank or in a pointless circular flow of funds back to Mr. Hagan by virtue of the bank's indemnity of Mr. Hagan in the Settlement Agreement. Furthermore, restitution in this transaction, in its most basic form, would actually be payment in satisfaction of the judgments obtained by the bank against LaBarba, Cooke, Plato, Padre and Trimar, which judgments have been assigned to Mr. Hagan by the bank in connection with the Settlement Agreement.

11. Page 12. Part E. Factors That May Warrant Departure, Para. (68): Filed and submitted to the Court along with these objections is a Sentencing Memorandum that details substantial reasons warranting a downward departure from the prescribed sentencing guidelines. This memorandum also references the substantial assistance Mr. Hagan has and will provide to the Government in prosecuting claims against Plato and LaBarba. Mr. Hagan's assistance has already led to securing the guilty plea of Mr. Plato, and Mr. Hagan's assistance should prove invaluable in the successful prosecution of LaBarba.

We trust the foregoing adequately explains Riley Hagan, III's objections to the presentence report dated January 20, 2000. If any further clarification is required,

please do not hesitate to contact Joseph Cage or me. Thank you for your consideration in this matter.

Yours very truly,

BARLOW AND HARDTNER L.C.

BY: /s/ Michael B. Donald
Michael B. Donald

MBD/jsb

cc: AUSA Sonia P. Cassidy

FILED UNDER SEAL

ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES V. RILEY HAGAN, III
DOCKET NO. 99-50095-01

The Probation Officer certifies the Presentence Report (PSR) including any revisions thereof, has been disclosed to the defendant, his attorney and counsel for the government, and that the content of the addendum has been communicated to counsel. The Addendum fairly states any objections that have been made.

OBJECTIONS

By the Government

None submitted.

By the Defendant

OBJECTION NO. 1 – FACE SHEET:

"Mr. Hagan was not charged with Conspiracy to Commit Bank Fraud. He was charged and pled guilty to a single count of Conspiracy to Misapply Bank Funds. This change should be made throughout the Presentence Report."

PROBATION OFFICER'S RESPONSE:

This objection does not affect the guideline calculation. According to the Bill of Information, the defendant was charged with a Conspiracy to Misapply Bank Funds. The PSR will be changed to reflect the defendant's notations.

OBJECTION NO. 2 – FACE SHEET:

"Additional related cases include the guilty plea of Richard M. Plato, Docket No. 99-50103-02, and Jerry G. LaBarba, Docket No. 99-50103-01, which is currently scheduled for trial beginning June 5, 2000."

PROBATION OFFICER'S RESPONSE:

This objection does not affect the guideline calculation. This defendant pled guilty to this offense on November 12, 1999, and the presentence investigation report was released to the defendant on January 20, 2000. The defendant was due to be sentenced on February 10, 2000. Due to a request by the defendant, sentencing was delayed and matters reference to other codefendants, which occurred after the original date of sentencing, did change. It is noted that on February 25, 2000, Richard M. Plato pled guilty to Count 4, Bank Fraud, and is due to be sentenced on June 1, 2000, at 1:15 p.m. before the Honorable Donald E. Walter. Jerry G. LaBarba, another codefendant in this case, is scheduled to go to trial on June 5, 2000.

The above information is included in the revised PSI.

OBJECTION NO. 3 – PARAGRAPHS 11-13:

These paragraphs should be amended to provide a full recitation of the facts.

"First, after the overdraft situation became apparent, and after Mr. Hagan was relieved from his responsibilities as the bank officer with chief responsibility for the Padre account, Deposit Guaranty entered into no less than three

separate workout agreements with Padre, LaBarba, Cooke, and Plato. Although varying in terms, each workout was designed to allow the refinery to perform as intended or to give time for a deal with third-party investors to close. The first workout was entered on June 30, 1997, and consolidated all Padre's debt with Deposit Guaranty, including the amount of the overdraft, into a single note for approximately $5 million. This Note, as was the overdraft amount, was fully secured and collateralized by virtue of the workout documents, but was secured from inception as a obligation under the original Credit Agreement, as well as the subsequent Amendments. The second workout was executed on July 18, 1997, and provided that (1) certain qualifying receivables would count toward Padre's payment obligation, (2) a limited letter of credit would be made available to Padre for short term operating capital, including the acquisition of feed stock, and (3) Padre would liquidate inventories at fair market prices. The third workout was entered on August 8, 1997, and established, in addition to continuing the above conditions, a weekly payment schedule.

Although the bank had the right to immediately seize and liquidate Padre's assets, Deposit Guaranty, independent of Mr. Hagan, chose the route of giving Padre, LaBarba, and Cooke additional opportunity to make a success of the refinery operation. This was manifested through the extension of additional credit to Padre for feed stock and other operating capital. Despite this forbearance, Deposit Guaranty nonetheless "tightened up the screws" on Padre's operations, affixing itself in a clear oversight, if not control, position. This included requiring the retention of an independent consultant, Roddy Engineering

Services, Inc., to oversee refinery operations and advise the bank. Deposit Guaranty also confirmed through the workout documents the full collateralization of the overdrafts under the Credit Agreements.

Second, this paragraph should also be amended to include a description of the collateral securing the loss from the insufficient funds checks. At the time Mr. Hagan's employment was terminated there were in excess of 200,000 barrels of crude and various product at the Padre Refinery and other storage locations valued at approximately $4.3 million securing the overdraft checks. Other collateral was also available, including real estate and funds on deposit in other Padre accounts at the bank. Mr. Hagan is entitled to an offset for the amount of secured collateral existing to offset the ultimate loss.

Finally, on February 25, 1999, Deposit Guaranty National Bank, formerly CNB, voluntarily entered into an agreement with Mr. Hagan settling all claims and causes of action it had against him, specifically any concerning his involvement or actions in connection with the Padre account, for a cash payment of $800,000.00. As part of this agreement, Deposit Guaranty Bank assigned and conveyed to Mr. Hagan its civil judgments against James G. LaBarba, Sr., John R. Cooke, Richard Plato, Padre Trading Company, Inc., and Trimar Corp. In addition, Deposit Guaranty National Bank agreed to indemnify and hold Mr. Hagan harmless from and against any and all demands, claims, actions, causes of action, judgments, liabilities, losses, and expenses based upon or arising out of the facts underlying this case, including, but not limited to, any demands or claims that might be asserted against Mr. Hagan by Deposit Guaranty National Bank,

its parents, affiliates, and subsidiaries, and St. Paul Mercury Insurance Company or any other insurance or bonding company for any loss suffered. This settlement, which was fully funded, established the amount of loss from the bank's perspective."

GOVERNMENT'S RESPONSE:

"In this objection, Hagan attacks the portion of the PSR addressing victim impact by claiming that the section "should be amended to provide a full recitation of the facts." As this is the section of the PSR that the court uses to calculate the amount of loss for restitution purposes, the government assumes that the additional information added by Hagan is intended to lower the amount of restitution required by the Mandatory Victims Restitution Act ("MVRA").

In his argument, Hagan first notes that while "the bank had the right to immediately seize and liquidate Padre's assets," it chose to continue working with the company after Hagan "was relieved from his responsibilities" at the bank. In pointing out these facts to the court, Hagan seems to be suggesting that at the time his fraud was discovered CNB was left with only two options: (1) liquidate the credit to determine the amount of loss caused by Hagan's fraud, or (2) continue working with the customer realizing that any future possibility of restitution is sacrificed. This is not the case.

Hagan's fraudulent conduct placed CNB in a situation that it never could have bargained for, *i.e.*, financing the advancement of large sums of money to Padre through a check kiting scheme. Once the fraud was discovered,

CNB was clearly entitled to take any steps, including lending additional funds, to mitigate damages caused by Hagan's deceit. The fact that an additional note was executed to secure the amount of the overdraft has no impact on the loss to the victim bank. *See United States v. Karam*, 201 F.3d 320, 329 (4th Cir. 1999) (fact that victims may have accepted promissory notes as compensation does not determine whether victims are entitled to restitution).

In his second argument, Hagan contends that the victim impact statement should be amended to include the description of the collateral securing the loss from the insufficient funds checks. As discussed in greater detail *infra*, not only was the collateral insufficient to cover the legitimate obligations incurred by Padre, under no circumstances should the available collateral be used to reduce fraudulently obtained overdrafts before being used to secure legitimately obtained loans. *See* Government's Response To Hagan Objection Four.

In his final argument on this issue, Hagan maintains that the settlement agreement that he reached with CNB "established the amount of loss from the bank's perspective." This argument has no support in law.

In order to settle any and all civil disputes between himself and the bank, Hagan agreed to pay the bank $800,000. In exchange the bank, *inter alia*, agreed to hold Hagan harmless from any claims related to the check kiting conspiracy. Despite this agreement, the law requires the court to order restitution.

A civil settlement agreement does not preclude an award of restitution pursuant to the Victim Witness Protection

Act ("VWPA") because restitution ordered under the act is primarily penal in nature. *See United States v. Sheinbaum*, 136 F.3d 433, 447 (5th Cir.1998). It matters not what the amount of loss is "from the bank's perspective." As the Supreme Court noted in *Kelly v. Robinson*:

> The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the [government] and the situation of the defendant.

429 U.S. 36, 55 (1986). 'That the victim has agreed in a civil proceeding that it has been compensated fully does not prevent a district court from pursuing the rehabilitative and retributive functions of the criminal law served by restitution.' *United States v. Sheinbaum*, 136 F.3d at 448."

PROBATION OFFICER'S RESPONSE:

Application Note 8 of §2F1.1 defines loss as the value of money unlawfully taken. The amount of money unlawfully taken in this case, as a result of the check kite, is $4,844,243.83. This amount reflects actual intended loss.

Per the Bill of Information, the last bad check written in this scheme was on June 20, 1997, and at that time the loss from the check kite was $4,844,243.57. If after the completion of this criminal act, the defendant or representatives of Padre attempted a "work out agreement" with CNB to pay back the proceeds of this criminal act,

the fact remains that the actual intended loss at the time of the first workout agreement was $4,844,243.57. It is noted that the workout agreements reached between Padre and the bank were structured to keep the refinery in operation in an effort to generate sufficient cash flow for the bank to recover the $4,844,243.57 loss resulting from this criminal act.

However, any amount paid back by Padre as a result of the series of workout agreement would be credited towards the remaining amount of restitution owed. Defense counsel should present to the Court any evidence they have in their possession reflecting any payments that were made resulting from the workout agreements and not merely recite approximate values of assets Padre may have possessed at the termination of the defendant's employment. The bank has stated that its total loss remains at $4,844,243.57.

Regarding the $800,000 settlement made by the defendant to CNB. On November 9, 1999, telephone contact was made with a representative of Deposit Guaranty formerly CNB, who advised that the settlement against the defendant was for malfeasance of corporate responsibility and not for the check kite. However, the Court could credit the defendant with this $800,000 settlement and reduce total restitution in this case to $4,044,243.57. This would not change the guideline calculation. The Probation Office believes the los should be as it is listed in the PSR.

OBJECTION NO. 4 – PARAGRAPH 20:

"This paragraph should be amended to reflect the objections made to Paragraphs (11) through (13) above. The calculation of loss attributable to Mr. Hagan should be a determination of "net loss" – that is the total amount of overdraft less the value of any collateral pledged to secure the amount owed. U.S.S.G. §2F1.1. This calculation must also consider the February 25, 1999, Settlement Agreement between Deposit Guaranty and Mr. Hagan. Considering both the value of available collateral and the settlement proceeds paid by Mr. Hagan, there should be no adjustment to the base offense level for 'specific offense characteristic.' "

GOVERNMENT'S RESPONSE:

"In objection number four to the Presentence Report, Riley Hagan ("Hagan") contends that considering both the value of available collateral and the settlement proceeds paid by Mr. Hagan, there should be no adjustment to the base offense level for "specific offense characteristics." While the apparent logic of this argument has some appeal, it fails to take into account the purpose behind the increase required by the Specific Offense Characteristics. As the name implies, Specific Offense Characteristics are used to increase the base offense level by taking into account the seriousness of a specific offense. In the case of Section 2F1.1(b)(1), the guidelines consider the amount of loss in determining the seriousness of the crime. The amount of loss is the greater of the intended loss or the actual loss caused by the check kiting scheme.

Taking Hagan at his word that he did not intend for the bank to lose any money, the amount of the actual loss suffered by the bank must be used to calculate the appropriate sentence. In a check kiting case the relevant point for determining the amount of loss is at the time the crime was detected. *See United States v. Frydenlund,* 990 F.2d 822 (5th Cir. 1993). Accordingly, permitting the amount of loss to be reduced by settlement payments or other uncertain collateral held by the bank is not appropriate for purposes of sentencing.

Settlement Payments Do Not Reduce The Amount Of Loss

As part of a confidential agreement Hagan paid $800,000 to the bank in order to settle any and all civil disputes between them. Although this payment may be relevant to the amount of restitution ultimately owed to the victim, it does not reduce the amount of loss for sentencing purposes.

In *United States v. Frydenlund,* 990 F.2d 822 (5th Cir. 1993), the court considered a case where a check kiting scheme was used to keep a struggling car dealership afloat. After the scheme was discovered, the owner of the dealership executed a promissory note which was secured by a second lien on the dealership properties. In challenging the severity of his sentence on appeal, the defendant argued that the actual loss suffered by the bank was zero because his promissory note covered the full amount of the overdraft created by the check kiting scheme. In rejecting this argument the court noted that restitution, "though commendable, did not decrease the seriousness of the crime he had committed." *Id.* at 826.

In *United States v. Akin*, 63 F.3d 700 (5th Cir. 1995), the court considered another check kiting case where, before sentencing, the defendant voluntarily repaid the victim bank some of the loss attributable to the scheme. At sentencing, the defendant contended that the amount of loss for purposes of Section 2F1.1 should be reduced by the amount of restitution already paid. See *Id.* at 700-701. The court disagreed and expressly held "that payments of restitution do not allow a district court to reduce its calculation of loss." *Id.* at 702.

In the case at bar, Hagan reached a settlement with the victim bank wherein he agreed to pay $800,000 in order to settle all civil disputes. While a civil settlement is arguably different than pure restitution, the analysis contained in the cases discussed *supra* would likewise preclude an amount paid in a civil settlement to reduce the amount of loss for sentencing purposes. *See United States v. Shaffer*, 35 F.3d 110 (3rd Cir. 1994).

To permit civil settlements and the payment of pre-sentence restitution to reduce the amount of the victim's loss for the purposes of sentencing would unfairly discriminate in favor of those with legal savvy and financial resources. *Id.* at 115. Perhaps a panel of the Sixth Circuit said it best when it noted that "defendants convicted of bank fraud by check kiting will not be permitted to buy their way out of jail by subsequently making voluntary restitution." *United States v. Flowers*, 55 F.3d 218, 221 (6th Cir. 1995).

Bank Collateral Does Not Reduce The Amount Of Loss

Hagan contends that in addition to the amount paid by virtue of the settlement agreement, the amount of loss

should be reduced by "any collateral pledged to secure the amount owed." Hagan's position on this issue seems to be grounded on the fact that Padre and the bank had a broadly worded security agreement that cross-collateralized the security provided by Padre with all obligations owed to the bank. The government concedes that, by definition, obligations owed to the bank include overdrafts. However, Hagan is not entitled to offset the amount of loss that he caused by the value of this security because he was not a party entitled to benefit from the terms of the security agreement. Furthermore, and perhaps more importantly, there is absolutely no validity to the argument that the security provided by Padre should be used to reduce fraudulently obtained overdrafts before being used to secure legitimately obtained loans.

Hagan was a Senior Vice President and officer at the bank and as such held a position of trust. Hagan had no ownership in Padre and was not acting as an agent of Padre's at the time of the fraud. Hagan represented the bank. As Hagan had no claim to or interest in the collateral provided by Padre, he should not be permitted to rely on that collateral to reduce the amount of loss attributable to his fraud.

Even if Hagan were entitled to rely on the collateral provided by Padre, it is not clear that the collateral was sufficient to cover the legitimate loans, much less the fraudulently obtained overdrafts. While the language in the security agreement between Padre and the bank was broad enough to cover the overdrafts created by this scheme, it would be absurd to maintain that fraudulently obtained overdrafts should be satisfied prior to legitimate obligations.

While the government has not found a case where the Fifth Circuit has squarely addressed this issue, the government would agree that certain types of liquid collateral in the hands of the bank could reduce the loss amount in limited circumstances. In *Frydenlund*, the court observed that "it is possible that the actual loss may in some cases be less than the overdraft when the kite is discovered." *United States v. Frydenlund*, at 826. The position adopted by the third circuit in *United States v. Shaffer* seems to be the proper approach. In that case the court found that the gross amount of the kite at the time of detection, less any other collected funds the defendant has on deposit with the bank at that time and any other offsets that the bank can immediately apply against the overdraft (including immediate repayments), is the loss to the victim bank. *United States v. Shaffer*, 35 F.3d at 115 (emphasis added).

In this case, there were no such offsets. The other collateral held by the bank, specifically real estate and inventory of questionable quality and marketability, was not the sort that could be immediately applied against the overdrafts. Furthermore, the collateral held by the bank was already committed to secure legitimately obtained loans.

In an affidavit submitted by the bank on April 18, 2000, Ronald G. Smith ("Smith"), the Area Executive for the Bank, advised that the value of the collateral held by the bank on June 19, 1997, is estimated to be $1,572,639. On this date, Padre had no collected funds and owed the bank approximately $3,382,651.43. Smith also advised that "[none of the collateral was the sort that could be instantly liquidated so that the Bank could 'immediately

apply' it to Padre's indebtedness to the bank." *See* Government Exhibit 1."

PROBATION OFFICER'S RESPONSE:

According to U. S. Sentencing Guidelines, the loss should be the amount of money taken or the actual intended loss. In this case, the amount of money taken was $4,844,243.57. The Probation Office is not aware of any collateral pledged at the inception or the end of the check kite scheme. If the defendant or representatives of Padre entered into workout agreements after the completion of the check kite, then the actual intended loss for guideline purposes is still the original $4,844,243.57. The bank currently still lists its loss as $4,844,243.57 and has only received money from the bonding company.

The Court could credit the defendant for the $800,000 settlement, but this would not affect the guideline calculation.

Therefore based on the above information, the thirteen point upward adjustment listed in paragraph 20 of the PSR should remain.

OBJECTION NO. 5 – PARAGRAPH 25:

Paragraph 25 should be amended to reflect the objections made to paragraph (20) above. As a result, the adjusted offense level (subtotal) computation should be 10.

GOVERNMENT'S RESPONSE:

Based on the government's response to Hagan's other objections, these objections are moot.

PROBATION OFFICER'S RESPONSE:

Based on all the above responses, the adjusted offense level subtotal in paragraph 25 should remain at 23.

OBJECTION NO. 6 – PARAGRAPH 27:

Paragraph 27 should be amended to reflect the objections made to paragraph (25) above. As a result, the adjusted offense level computation should be 7.

GOVERNMENT'S RESPONSE:

See Government's Response to Objection No. 5.

PROBATION OFFICER'S RESPONSE:

See Probation Office's response to Objection No. 5.

OBJECTION NO. 7 – PARAGRAPH 29:

Paragraph 29 should be amended to reflect the objections made to paragraph (27) above. As a result, the total offense level computation should be 7.

GOVERNMENT'S RESPONSE:

See Government's Response to Objection No. 5.

PROBATION OFFICER'S RESPONSE:

See Probation Office's response to Objection No. 16.

OBJECTION NO. 8 – PARAGRAPH 51:

"This paragraph should be amended to reflect that restitution is not mandatory without consideration of relevant factors, and may properly not be imposed or may be adjusted based upon ability to pay."

GOVERNMENT'S RESPONSE:

"In objection number eight to the presentence report, Hagan incorrectly asserts that "restitution is not mandatory without consideration of relevant factors, and may properly not be imposed or may be adjusted based upon ability to pay." The government can only assume that this argument is based on the law as it existed prior to the 1996 enactment of the MIVRA. The law now specifically provides:

In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's loss as determined by the court and without consideration of the economic circumstances of the defendant.

18 U.S.C. § 3664(f)(1)(A) (emphasis added). The court only considers the defendant's ability to pay when determining the manner in which restitution is paid. Financial ability is not a factor in determining the amount of restitution owed. *See* 18 U.S.C. § 3664(f)(2)."

PROBATION OFFICER'S RESPONSE:

See Probation Officer's response to Objection No. 10.

OBJECTION NO. 9 – PARAGRAPH 53:

Based on the objections made above, it is submitted that Mr. Hagan's base offense level of 6, together with a -3 level adjustment for acceptance of responsibility, results in a guideline imprisonment range of 0-6 months.

GOVERNMENT'S RESPONSE:

Based on the government's response to Hagan's other objections, this objection is moot.

PROBATION OFFICER'S RESPONSE:

Based on all the above responses to objections listed by the defendant, the Probation Office submits that there should be no change to paragraph 53 and the offense level should remain at 20. It is noted that defense counsel's calculations in objection #9 has a number of errors.

OBJECTION NO 10. – PARAGRAPHS 64 – 67:

"These paragraphs should be amended to reflect that restitution is not mandatory without consideration of relevant factors, including ability to pay. The "Financial Condition: Ability to Pay" section of the presentence report clearly shows Mr. Hagan's inability to pay restitution. Moreover, the Court may not order restitution to a victim who has already received compensation for its

loss. Here, Deposit Guaranty as been fully compensated for its loss by its own acknowledgment in the February 25, 1999, Settlement Agreement between the bank and Mr. Hagan, as well as through payments from a third-party, St. Paul Fire and Marine Insurance Company. St. Paul, through contract, waived its entitlement to restitution and would be obligated to forward any restitution payment to Deposit Guaranty. This would result either in a double recovery and unreasonable windfall for the bank or in a pointless circular flow of funds back to Mr. Hagan in the Settlement Agreement. Furthermore, restitution in this transaction, in its most basic form, would actually be payment in satisfaction of the judgments obtained by the bank against LaBarba, Cooke, Plato, Padre and Trimar, which judgments have been assigned to Mr. Hagan by the bank in connection with the Settlement Agreement."

GOVERNMENT'S RESPONSE:

"In objection number ten, Hagan continues his insistence that restitution is not mandatory. He further maintains that the court may not order compensation to a victim that has already been compensated. In support of this argument Hagan cites the terms of the settlement agreement and the fact that the bank received some compensation from its insurance carrier. Hagan contends that ordering restitution to the bank and to the insurance company would be pointless because it would create a "circular flow of funds back to Mr. Hagan by virtue of the bank's indemnity of Mr. Hagan in the Settlement Agreement." Once again, Hagan's conclusions have no legal support.

As noted *supra*, the settlement agreement and his ability to pay restitution have no bearing on the restitution order. Furthermore, the court is not permitted to consider the payment of insurance proceeds to the victim when ordering restitution. *See* 18 U.S.C. § 3664(f)(1)(B). Moreover, an order of restitution would not create a "circular flow of funds back to Mr. Hagan." As discussed in greater detail *supra*, the agreement between Hagan and the bank only absolves Hagan of civil liability. Restitution awards are punitive and must be paid. The bank may be stopped from seeking further payments from Hagan but the government and the court are not. The court can order and the government can collect restitution on behalf of victims despite the civil settlement because "the law will not tolerate privately negotiated end runs around the criminal justice system." *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993). Unless the bank voluntarily decided to return the funds, any payments received by the bank or the insurance company by virtue of the restitution order do not have to be returned to Hagan. *See United States v. Cloud*, 876 F.2d 846, 854 (9th Cir. 1989)."

PROBATION OFFICER'S RESPONSE (To Objections 8 & 10):

According to 18 U.S.C. §3663(A) restitution is mandatory. If defense counsel can cite information in the statute to the contrary, please advise the Court.

The February 25, 1999, civil agreement between the bank and the defendant, which is referred to by the defendant in this objection, is governed and construed in accordance with the laws of the State of Louisiana. The Court is not

bound by this agreement at sentencing. Defense counsel should submit any additional information they may possess indicating that any of the workout agreements resulted in the total criminal liability of $4,844,243.57 being paid in full.

The defendant has paid $800,000 in a settlement with CNB. The bank asserts that this was corporate malfeasance in office. If the Court considers this settlement as part of restitution, then restitution could be reduced by $800,000.

OBJECTION NO. 11 – PARAGRAPH 68:

"Filed and submitted to the Court along with these objections is a Sentencing Memorandum that details substantial reasons warranting a downward departure from the prescribed sentencing guidelines. This memorandum also references the substantial assistance Mr. Hagan has and will provide to the Government in prosecuting claims against Plato and LaBarba. Mr. Hagan's assistance has already led to securing the guilty plea of Mr. Plato, and Mr. Hagan's assistance should prove invaluable in the successful prosecution of LaBarba."

GOVERNMENT'S RESPONSE:

"The government objects to a downward departure because Hagan's cooperation, to date, has not reached the level of substantial assistance. Therefore, the government has not filed a motion pursuant to section 5K1.1. Counsel has been informed that if Hagan continues to accept responsibility, and if his cooperation provides substantial

assistance to the government, we will consider filing a motion pursuant to Rule 35 on his behalf.

The government has no objections to the PSR."

PROBATION OFFICER'S RESPONSE:

The Probation Office can cite no factors warranting a departure. Matters regarding downward departures for substantial assistance are in the sole and non-reviewable discretion of the U. S. Attorney. If a downward departure is filed by the government on behalf of the defendant for substantial assistance, the Court will be notified.

Respectfully submitted,
ED HARRELL
Chief U.S. Probation Officer

by /s/ Jon W. Novak
Jon W. Novak
U.S. Probation Officer

Approved:

/s/ Thomas A. Goleman 5-2-00
Thomas A. Goleman Date
Supervising U.S. Probation Officer

JWN:ldg

United States District Court
Western District of Louisiana
Shreveport Division

UNITED STATES OF AMERICA

v. Case Number 99-50095-01

RILEY HAGAN, III
Defendant.

SECOND AMENDED JUDGMENT IN A CRIMINAL CASE*
(For Offenses Committed On or After November 1, 1987)

(Filed Dec. 1, 2000)

The defendant, RILEY HAGAN, III, was represented by Michael B. Donald and Joseph S. Cage, Jr.

The defendant pleaded guilty to count ONE of the bill of information filed on November 12, 1999. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number
18 USC 371	Conspiracy to Misapply Bank Funds	06/20/97	1

* Sentence is reduced to 25 months in consideration of the Government's motion for reduction of sentence under F.R.Cr.P. 35

The defendant is sentenced as provided in pages 1 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count ONE, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 1st day of December, 2000.

/s/ Donald E. Walter
DISTRICT JUDGE
DONALD E. WALTER

Defendant's SSN: 428-31-1125

Defendant's Date of Birth: 07/04/64

Defendant's Address: 8601 Millicent Way, Apt. 125, Shreveport, LA 71115

Defendant's USM No: 10457-035

JUDGMENT ENTERED
December 4, 2000
By [Illegible]
COPY Cassidy/Cage/Donald/Gates
USA - Collections

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 25 months.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. As a special condition of supervised release, defendant shall, at the request of the probation office, disclose all business and personal financial information.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall submit to drug abuse treatment as indicated by the probation office, to include antabuse and drug surveillance, if indicated, and/or inpatient treatment, until such time defendant is released from supervised release.

For Offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth

below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee

Deposit Guaranty National Bank
Attention: Frank Meigs
One Deposit Guaranty Plaza
P.O. Box 1200
Jackson, MS 39215
Amount: $1,135,243.53

St. Paul Fire and Marine Insurance Company
Attention: Marvin Alexander
385 Washington Street
St. Paul, MN 55102
Amount: $2,847,000.00

Payments of restitution are to be made to the United States District Clerk.

Restitution shall be paid jointly and severally and shall be made in monthly installments at a rate of not less than 20% of defendant's gross monthly income to commence 30 days following release from custody.

The interest requirement was waived.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	20
Criminal History Category:	I
Imprisonment Range:	33 months to 41 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$7,500 to $75,000
Restitution:	$3,982,243.53

The fine is waived because of the defendant's inability to pay.

The sentence departs from the guideline based on the Court's ruling on the Government's motion for reduction of sentence under F.R.Cr.P. 35.

United States District Court
Western District of Louisiana
Shreveport Division

UNITED STATES OF AMERICA

v. Case Number 99-50095-01

RILEY HAGAN, III
Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE*
(For Offenses Committed On or After November 1, 1987)

(Filed May 15, 2000)

The defendant, RILEY HAGAN, III, was represented by Michael B. Donald and Joseph S. Cage, Jr.

The defendant pleaded guilty to count ONE of the bill of information filed on November 12, 1999. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18 USC 371	Conspiracy to Misapply Bank Funds	06/20/97	1

As pronounced on May 4, 2000, the defendant is sentenced as provided in pages 1 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

---

* Judgment amended to include Page 5 of 5, Statement of Reasons

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count ONE, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 12 day of May, 2000.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES
DISTRICT JUDGE

Defendant's SSN: 428-31-1125

Defendant's Date of Birth: 07/04/64

Defendant's Address: 8601 Millicent Way, Apt. 125, Shreveport, LA 71115

Defendant's USM No: 10457-035

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 33 months.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on or before 1:00 PM on July 31, 2000.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. As a special condition of supervised release, defendant shall, at the request of the probation office, disclose all business and personal financial information.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall submit to drug abuse treatment as indicated by the probation office, to include antabuse and

drug surveillance, if indicated, and/or inpatient treatment, until such time defendant is released from supervised release.

For Offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee

Deposit Guaranty National Bank
Attention: Frank Meigs
One Deposit Guaranty Plaza
P.O. Box 1200
Jackson, MS 39215
Amount: $1,135,243.53

St. Paul Fire and Marine Insurance Company
Attention: Marvin Alexander
385 Washington Street
St. Paul, MN 55102
Amount: $2,847,000.00

Payments of restitution are to be made to the United States District Clerk.

Restitution shall be paid jointly and severally and shall be made in monthly installments at a rate of not less than 20% of defendant's gross monthly income to commence 30 days following release from custody.

The interest requirement is waived.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	20
Criminal History Category:	I
Imprisonment Range:	33 months to 41 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$7,500 to $75,000
Restitution:	$3,982,243.53

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

United States District Court
Western District of Louisiana
Shreveport Division

UNITED STATES OF AMERICA

v.

RILEY HAGAN, III

Defendant.

Case Number
99-50095-01

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

(Filed May 8, 2000)

The defendant, RILEY HAGAN, III, was represented by Michael B. Donald and Joseph S. Cage, Jr..

The defendant pleaded guilty to count ONE of the bill of information filed on November 12, 1999. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Misapply Bank Funds	06/20/97	1

As pronounced on May 4, 2000, the defendant is sentenced as provided in pages 1 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count ONE, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 5th day of May, 2000.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT
JUDGE

Defendant's SSN: 428-31-1125
Defendant's Date of Birth: 07/04/64
Defendant's Address: 8601 Millicent Way, Apt. 125;
Shreveport, LA 71115
Defendant's USM No: 10457-035

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 33 months.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on or before 1:00 PM on July 31, 2000.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. As a special condition of supervised release, defendant shall, at the request of the probation office, disclose all business and personal financial information.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall submit to drug abuse treatment as indicated by the probation office, to include antabuse and

drug surveillance, if indicated, and/or inpatient treatment, until such time defendant is released from supervised probation.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee

Deposit Guaranty National Bank
Attention: Frank Meigs
One Deposit Guaranty Plaza
P.O. Box 1200
Jackson, MS 39215
Amount: $1,135,243.53

St. Paul Fire and Marine Insurance Company
Attention: Marvin Alexander
385 Washington Street
St. Paul, MN 55102
Amount: $2,847,000.00

Payments of restitution are to be made to the United States District Clerk.

Restitution shall be paid jointly and severally and shall be made in monthly installments at a rate of not less

than 20% of defendant's gross monthly income to commence 30 days following release from custody.

The interest requirement is waived.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31447

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RILEY HAGAN, III

Defendant - Appellant

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

---

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 6/7/01, 5 Cir., ___, ___ F.3d ___)

(Filed Jul. 06, 2001)

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge
Judge Barksdale did not participate in the consideration of the petition for rehearing en banc.

UNITED STATES CONSTITUTION

U.S. Const. Amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. Amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATUTES

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

---

18 U.S.C. § 656. Theft, embezzlement, or misapplication by bank officer or employee:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.], or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of

the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

"As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term 'branch or agency of a foreign bank' means a branch or agency described in section 20(9) of this title. For purposes of this section, the term 'depository institution holding company' has the meaning given such term in section 3 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813]."

---

18 U.S.C. § 3663. Order of restitution

"(a) (1) (A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

"(B) (i) "The court, in determining whether to order restitution under this section, shall consider –

"(I) the amount of the loss sustained by each victim as a result of the offense; and

"(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's

dependents, and such other factors as the court deems appropriate.

"(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

"(2) For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

"(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

"(b) The order may require that such defendant –

"(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

"(A) return the property to the owner of the property or someone designated by the owner; or

"(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

"(i) the value of the property on the date of the damage, loss, or destruction, or

"(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

"(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 –

"(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

"(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

"(C) reimburse the victim for income lost by such victim as a result of such offense;

"(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

"(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

"(c) (1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

"(2) (A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

"(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

"(3) Restitution under this subsection shall be distributed as follows:

"(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

"(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

"(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

"(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

"(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

"(7) (A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

"(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

"(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664."

---

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes:

"(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

"(2) For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an

offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

"(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

"(b) The order of restitution shall require that such defendant –

"(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

"(A) return the property to the owner of the property or someone designated by the owner; or

"(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

"(i) the greater of –

"(I) the value of the property on the date of the damage, loss, or destruction; or

"(II) the value of the property on the date of sentencing, less

"(ii) the value (as of the date the property is returned) of any part of the property that is returned;

"(2) in the case of an offense resulting in bodily injury to a victim –

"(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

"(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

"(C) reimburse the victim for income lost by such victim as a result of such offense;

"(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

"(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

"(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

"(A) that is –

"(i) a crime of violence, as defined in section 16;

"(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

"(iii) an offense described in section 1365 (relating to tampering with consumer products); and

"(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

"(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

"(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

"(A) the number of identifiable victims is so large as to make restitution impracticable; or

"(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or

prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

"(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664."

---

18 U.S.C. § 3664. Procedure for issuance and enforcement of order of restitution:

"(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

"(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

"(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

"(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

"(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable –

"(A) provide notice to all identified victims of –

"(i) the offense or offenses of which the defendant was convicted;

"(ii) the amounts subject to restitution submitted to the probation officer;

"(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

"(iv) the scheduled date, time, and place of the sentencing hearing;

"(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

"(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

"(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

"(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

"(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

"(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

"(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

"(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

"(f) (1) (A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

"(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

"(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of –

"(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

"(B) projected earnings and other income of the defendant; and

"(C) any financial obligations of the defendant; including obligations to dependents.

"(3) (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

"(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

"(4) An in-kind payment described in paragraph (3) may be in the form of –

"(A) return of property;

"(B) replacement of property; or

"(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

"(g) (1) *No victim shall be required* to participate in any phase of a restitution order.

"(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

"(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

"(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

"(j) (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

"(2) Any amount paid to a victim under an order of restitution shall be reduced by any

amount later recovered as compensatory damages for the same loss by the victim in –

"(A) any Federal civil proceeding; and

"(B) any State civil proceeding, to the extent provided by the law of the State.

"(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

"(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

"(m) (1) (A) (i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

"(ii) by all other available and reasonable means.

"(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

"(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

"(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

"(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

"(1) such a sentence can subsequently be –

"(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

"(B) appealed and modified under section 3742;

"(C) amended under section 3664(d)(3); or

"(D) adjusted under section 3664(k), 3572, or 3613A; or

"(2) the defendant may be resentenced under section 3565 or 3614.

"(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States."

U.S. SENTENCING GUIDELINES

U.S.S.G. § 2F1.1. FRAUD AND DECEIT; FORGERY; OFFENSES INVOLVING ALTERED OR COUNTERFEIT INSTRUMENTS OTHER THAN COUNTERFEIT BEARER OBLIGATIONS OF THE UNITED STATES:

"(a) Base Offense Level: 6

"(b) Specific Offense Characteristics

"(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest) Increase in Level

"(A)	$2,000 or less	no increase
"(B)	More than $2,000	add 1
"(C)	More than $5,000	add 2
"(D)	More than $10,000	add 3
"(E)	More than $20,000	add 4
"(F)	More than $40,000	add 5
"(G)	More than $70,000	add 6
"(H)	More than $120,000	add 7
"(I)	More than $200,000	add 8
"(J)	More than $350,000	add 9
"(K)	More than $500,000	add 10
"(L)	More than $800,000	add 11
"(M)	More than $1,500,000	add 12
"(N)	More than $2,500,000	add 13
"(O)	More than $5,000,000	add 14
"(P)	More than $10,000,000	add 15
"(Q)	More than $20,000,000	add 16
"(R)	More than $40,000,000	add 17
"(S)	More than $80,000,000	add 18.

"(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

"(3) If the offense was committed through mass-marketing, increase by 2 levels.

"(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

"(5) If the offense involved –

"(A) the possession or use of any device-making equipment;

"(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

"(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or

"(ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

"(6) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

"(7) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

"(8) If the offense –

"(A) substantially jeopardized the safety and soundness of a financial institution; or

"(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

"(c) Special Instruction

"(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

"Application Notes:

"1. The adjustments in § 2F1.1(b)(4) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.

"2. 'More than minimal planning' (subsection (b)(2)(A)) is defined in the Commentary to § 1B1.1 (Application Instructions).

"3. 'Mass-marketing,' as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

"4. 'Scheme to defraud more than one victim,' as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, 'victim' refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.

"5. Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on

behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

"6. Subsection (b)(4)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).

"If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.

"7. Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).

"8. Valuation of loss is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40,000.

"There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

"(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

"A fraud may involve the misrepresentation of the value of an item that does have some value

(in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

"(b) Fraudulent Loan Application and Contract Procurement Cases

"In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

"In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to

obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

"(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

"In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government

and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

"(d) Diversion of Government Program Benefits

"In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

"(e) Davis-Bacon Act Cases

"In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

"9. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

"10. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy)

whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to § 2X1.1.

"11. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

"(a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

"(b) false statements were made for the purpose of facilitating some other crime;

"(c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

"(d) the offense endangered national security or military readiness;

"(e) the offense caused a loss of confidence in an important institution;

"(f) the offense involved the knowing endangerment of the solvency of one or more victims.

"In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

"12. Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this

guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

"Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than § 2F1.1.

"13. If the fraud exploited vulnerable victims, an enhancement will apply. See § 3A1.1 (Hate Crime Motivation or Vulnerable Victim).

"14. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 would be more apt, and false statements to a customs officer, for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases, § 2F1.1 is to be applied, but a departure from the guidelines may be considered.

"15. For purposes of subsection (b)(5) –

" 'Counterfeit access device' (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. 'Telecommunications service' has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"'Device-making equipment' (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also includes (i) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (ii) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). 'Scanning receiver' has the meaning given that term in 18 U.S.C. § 1029(e)(8).

" 'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(3), except that such means of identification shall be of an actual (i.e., not fictitious) individual other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct).

"'Produce' includes manufacture, design, alter, authenticate, duplicate, or assemble. 'Production' includes manufacture, design, alteration, authentication, duplication, or assembly.

" 'Unauthorized access device' has the meaning given that term in 18 U.S.C. § 1029(e)(3).

"16. Subsection (b)(5)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

"Examples of conduct to which this subsection should apply are as follows:

"(A) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

"(B) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

"Examples of conduct to which subsection (b)(5)(C)(i) should not apply are as follows:

"(A) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

"(B) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

"Subsection (b)(5)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

"In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

"(A) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

"(B) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.

"(C) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

"17. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in Application Note 15.

"18. For purposes of subsection (b)(6)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

"For purposes of subsection (b)(6)(C), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

"The enhancement for sophisticated means under subsection (b)(6)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).

"If the conduct that forms the basis for an enhancement under subsection (b)(6) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.

"19. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or

employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"20. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

"21. 'The defendant derived more than $1,000,000 in gross receipts from the offense,' as used in subsection (b)(8)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or

indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

"22. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

"23. If subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2).

"If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).

"Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

"Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

"The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

"Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. The commission of a fraud in the course of a bankruptcy proceeding subjects the defendant to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.

"Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

"Subsections (b)(5)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.

"Subsection (b)(5)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as 'affirmative identity theft' or 'breeding,' in which a defendant uses another individual's name, social security number, or some other form of identification (the 'means of identification') to 'breed' (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines 'means of identification,' the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were 'bred' (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been 'stolen.' Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

"Subsection (b)(6) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.

"Subsection (b)(7)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

"Subsection (b)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

"Subsection (b)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

"Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104-132."

U.S.S.G. § 5E1.1. RESTITUTION:

"(a) In the case of an identifiable victim, the court shall –

"(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

"(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

"(b) Provided, that the provisions of subsection (a) do not apply –

"(1) when full restitution has been made; or

"(2) in the case of a restitution order under 18 U.S.C. § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

"(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

"(d) In a case where there is no identifiable victim and the defendant was convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, the court, taking into consideration the amount of public harm caused by the offense and other relevant factors, shall order an amount of community restitution not to exceed the fine imposed under § 5E1.2.

"(e) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See 18 U.S.C. § 3664(f)(3)(A). An in-kind

payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See 18 U.S.C. § 3664(f)(4).

"(f) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

"(g) Special Instruction

"(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former § 5E1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

"Application Note:

"1. The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under Chapter 46 or 96 of Title 18, United States Code, or under the Controlled Substances Act (21 U.S.C. § 801 et seq.). See 18 U.S.C. § 3663(c)(4).

"Furthermore, a penalty assessment under 18 U.S.C. § 3013 or a fine under Subchapter C of Chapter 227 of Title 18, United States Code, shall take precedence over an order of community restitution under subsection (d). See 18 U.S.C. § 3663(c)(5).

"Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, 'in determining the particular sentence to be imposed,' to consider 'the need to provide restitution to any victims of the offense.' Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

"Subsection (d) implements the instruction to the Commission in section 205 of the Antiterrorism and Effective Death Penalty Act of 1996. This provision directs the Commission to develop guidelines for community restitution in connection with certain drug offenses where there is no identifiable victim but the offense causes 'public harm.'

"To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	CR. NO. 99-50095-01
VERSUS	*	18 U.S.C. §371
RILEY HAGAN, III	*	JUDGE WALTER

BILL OF INFORMATION

(FILED 11/12/99)

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE
18 U.S.C. §371

A. Introduction

At all times material herein:

1. Commercial National Bank (hereinafter referred to as CNB) of Shreveport, Louisiana was a banking and financial institution with deposits insured by the Federal Deposit Insurance Corporation.

2. Deposit Guaranty National Bank (hereinafter referred to as Deposit Guaranty), Jackson, Mississippi, was a bank owned by Deposit Guaranty Corporation, with deposits insured by the Federal Deposit Insurance Corporation.

3. CNB was acquired by Deposit Guaranty Corporation, but continued to operate as CNB until CNB merged with Deposit Guaranty on July 14, 1997.

4. Padre Trading Company, Inc. (hereinafter referred to as Padre), was a corporation under the laws of the States of Louisiana and Texas.

5. James G. "Jerry" LaBarba, Sr. was President of Padre and John R. Cooke was Vice-President of Marketing.

6. Padre opened checking account number 610-0053314 at CNB with James G. "Jerry" LaBarba, Sr. and John R. Cooke authorized to sign on the account.

B. Offense

Beginning sometime in 1997, the exact date being uncertain, and continuing up to or on or about June 20, 1997, in the Western District of Louisiana and elsewhere, the defendant, Riley Hagan, III, while Senior Vice-President of Commercial National Bank, whose deposits were insured by the Federal Deposit Insurance Corporation, and others, known and unknown, wilfully and knowingly did conspire and agree together to commit an offense or offenses against the United States, to wit: Title 18, United States Code, Section 656, that is to knowingly, wilfully and with intent to deceive the above bank, misapplied funds belonging to and entrusted to the care and custody of said bank.

C. Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, Riley Hagan, III and others, committed or caused to be committed, the following overt acts, among

others, within the Western District of Louisiana and elsewhere:

1. A series of fourteen (14) checks were deposited into Padre's checking account number 610-0053314 with Commercial National Bank between the dates of April 29, 1997 and June 20, 1997, which checks were drawn on accounts with insufficient funds.

2. When various banks returned the checks for insufficient funds, the defendant, Riley Hagan, III, sent the checks back for collection, thus increasing the time for the worthless checks to be presented and returned to Commercial National bank.

3. After Riley Hagan granted Padre immediate credit for the items Hagan knew were insufficient, he then allowed CNB funds to be wired from Padre's account and checks drawn on Padre's account to be paid when in fact the account was in overdraft status.

The conspiracy set forth herein, and the above-described overt acts, being in violation of Title 18, United States Code, Section 371.

A TRUE BILL OF INFORMATION

MICHAEL D. SKINNER
United States Attorney

By: /s/ Sonia P. Cassidy
SONIA P. CASSIDY, I.D. #8615
Assistant United States Attorney
300 Fannin St., Suite 3201
Shreveport, LA 71101-3068
(318) 676-3600

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL
V.	:	DOCKET
	:	No. 99-50095-01
RILEY HAGAN, III	:	Shreveport, Louisiana
	:	November 12, 1999
	:	10:00 a.m.
.....	:	

Guilty Plea before the Honorable Donald E. Walter, United States District Judge.

APPEARANCES:

FOR THE GOVERNMENT: AUSA Sonia P. Cassidy
U.S. Attorney's Office
300 Fannin Street,
Suite 3201
Shreveport, Louisiana
71101-3068

FOR THE DEFENDANT: Mr. Joe Cage
Mr. Mike Donald
Deep South Surplus, Inc.
Post Office Box 202
Shreveport, Louisiana 71162

Court Reporter: Marie Moran Runyon, RMR, CRR
U.S. Court Reporters Office
300 Fannin Street, Room 4212
Shreveport, Louisiana 71101
(318) 222-9203

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

[2] (Court called to order, defendant present.)

THE COURT: Be seated, please. We're here on United States versus Riley Hagan, 99-50095-01.

Ms. Cassidy, any filings?

MS. CASSIDY: Yes, Your Honor. I have tendered to the clerk a Bill of Information and an executed Plea Agreement, along with a Waiver of Indictment and an Understanding of Maximum Penalty and Constitutional Rights.

THE COURT: Any objections, Mr. Cage?

MR. CAGE: None, Your Honor.

THE COURT: Okay. They are received without objection.

Mr. Cage, if you and your client would come up to one of the two places.

THE COURT: Hi, Mike.

MR. DONALD: Hello, Judge.

MR. CAGE: Morning, Your Honor. Mr. Donald is my co-counsel in this matter this morning.

THE COURT: Okay. I know Mr. Donald.

MR. CAGE: I understand you do, Judge. And this is my client, Mr. Hagan, Riley Hagan.

THE COURT: I understand, Mr. Hagan, that you're going to plead guilty to a one-count bill of information; is that right?

THE DEFENDANT: Yes, Your Honor.

[3] THE COURT: Before I accept your plea, there are a number of things that I have to tell you, some questions I have to ask you, because I've got to be sure that you're entering into a valid plea and voluntarily. So if I ask you something that you don't understand, tell me and I'll rephrase the question. Okay?

THE DEFENDANT: All right. Thank you.

THE COURT: If at any time you want to stop and talk to Mr. Cage or Mr. Donald, let me know. We'll stop and do whatever is necessary. Take all the time you need. Okay?

THE DEFENDANT: Thank you. I appreciate that.

THE COURT: If you'll raise your hand, please, and be sworn. Your right hand.

(Defendant sworn.)

THE COURT: Do you understand that, having been sworn, if you don't tell me the truth, the government might prosecute you for perjury or for false swearing?

THE DEFENDANT: I understand, Your Honor.

THE COURT: How old are you, sir?

THE DEFENDANT: Thirty-five, Your Honor.

THE COURT: And how far did you go in school?

THE DEFENDANT: I have a bachelors degree from Louisiana Tech in engineering, sir.

THE COURT: Have you taken any medication, alcohol, drugs, anything that would interfere with your ability to [4] comprehend what's going on here today?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Cage, you've talked to your client?

MR. CAGE: Yes, Your Honor.

THE COURT: I mean, today, recently?

MR. CAGE: Yes, sir. This morning.

THE COURT: Any question in your mind as to his competence to plead at this time?

MR. CAGE: None at all, Judge.

THE COURT: I find him competent.

Have you had all the time you need to discuss your case with your attorneys?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied with Mr. Cage and Mr. Donald as lawyers?

THE DEFENDANT: Yes, sir, I am.

THE COURT: First, let me tell you, you don't have to be here now. Our Constitution says that the

government can't do what they have done, file a bill of information, without your permission. You have a right to insist that they present your case to the grand jury. That is a group of your fellow citizens, 23 in number, 12 – at least –

Is it 12 or 13?

MR. CAGE: Twelve, Your Honor.

THE COURT: – at least 12 of whom must agree that [5] the government has presented probable cause to charge you with this crime. You understand that?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: And as Mr. Cage will tell you, it is not without precedent that a grand jury refuses to return true bill. You understand that?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: And are you sure you want to waive that grand jury?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Well, here we are now. Even now the Constitution and laws of this country continue to protect you. You're entitled to a trial by 12 of your fellow citizens on the charges contained in the Information. In order to convict you, all 12 would have to unanimously agree that the government has proven you guilty beyond a reasonable doubt. You understand that?

THE DEFENDANT: I do, sir.

THE COURT: In other words, you're presumed innocent until the government overcomes that presumption with good and sufficient evidence and, as I said, beyond a reasonable doubt. You don't have to prove one thing. Do you understand that?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: If there was a trial, the witnesses for [6] the government would have to come and testify in your presence. Your lawyers could cross-examine the witnesses offered by the government, object to any evidence offered by the government. You could offer evidence in your behalf, subpoena witnesses from anywhere. You can testify. No one can compel you to testify, but you have the right to testify should you choose to do so. Do you understand all that?

THE DEFENDANT: I do understand that, sir.

THE COURT: If I accept your guilty plea, none of that's going to happen. I'm just going to enter a judgment of guilty based on your plea. You understand?

THE DEFENDANT: I understand, Your Honor.

THE COURT: I'm also going to ask you about what you did, so you're going to have to waive your right against self-incrimination. You understand that?

THE DEFENDANT: I understand that.

THE COURT: Are you willing to give up all those rights?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you sure?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Tell me what you think you're pleading guilty to in your own words. Don't – I assume you've gone over the Bill of Information with Mr. Cage, right?

[7] THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: Okay. Now, in your own words, tell me what you think you're pleading guilty to.

THE DEFENDANT: The Bill of Information refers to a series of 14 checks that were presented to the account at Commercial National Bank where I was the account officer for Padre Trading. During that series of 14 checks, I became aware that the checks being deposited were no good, and the right thing to have done under the circumstances would have been to shut down the account and take steps to protect the bank. I didn't do the right thing, Your Honor. I did the wrong thing. I made a decision to continue to facilitate the presentment of those worthless checks, and that ultimately resulted in a loss to the bank.

THE COURT: Why did you do that?

THE DEFENDANT: I was told by Mr. LaBarba and Mr. Cooke that investors were lined up to replenish the account and that they just needed to have a couple of days to close the transaction, and I agreed to help them get those couple of days, and the couple of days turned into a couple of weeks and – and ultimately the investors never materialized, and by then the account's deficit balance had grown to a significant number.

THE COURT: As I recall, over a million?

THE DEFENDANT: Yes, sir. Several million.

[8] THE COURT: I tried part of this case, didn't I, Ms. Cassidy?

MR. CAGE: I think you accepted a plea from Mr. Cooke, Your Honor. I think you might be referring to the environmental case, also.

THE COURT: That's right.

Okay. The maximum penalty for this matter is a fine of a million dollars and/or a sentence of up to five years, a period of supervised release of not less than two nor more than three years, and a $100 assessment to the Crime Victim Fund, and maybe restitution. Did you know that?

THE DEFENDANT: I understand that, sir.

THE COURT: Do you know that parole has been abolished? There's no such thing as parole in the federal system.

THE DEFENDANT: Yes, sir, I understand that.

THE COURT: On supervised release, you have to comport yourself in a certain fashion, and if you violate any of the terms of that, even on the last day, you might find yourself back before me or another judge who might sentence you to the full amount of the supervised release, even if that exceeds the statutory maximum. Do you understand that?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Did anyone threaten you or force you to plead guilty?

[9] THE DEFENDANT: No, Your Honor.

THE COURT: There is a plea agreement entered into, and let me tell you what I think it says and you can tell me what I missed. You're going to plead guilty to this one-count Bill of Information, the government is not going to prosecute you for anything else that they know about at this time, in return for which you're going to cooperate with them fully; that is, you're going to tell the truth, you're going to meet with whoever the U.S. Attorney asks you to meet with, you're going to be prepared to testify at a grand jury or any trial, and to testify truthfully, in return for which they will give you use immunity on anything that you tell them; that is, they will not use anything against you that you tell them. You understand all that?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: And that that seems to be – oh. And that if you do cooperate, the government will advise me of any assistance that you have given and they may, but they're not required to, they may move for a downward departure from that sentence called for by the guideline if your assistance is substantial. You understand that they're the sole judges of what is substantial?

THE DEFENDANT: Yes, sir, I understand that.

THE COURT: And neither you, nor I, nor Mr. Cage can make them move for such a downward departure if they don't [10] want to. You understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Now, is that pretty much what you understand the plea agreement to consist of?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Any other promises made to you?

THE DEFENDANT: No, sir.

THE COURT: Mr. Cage, is that the terms of the plea agreement?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: And Ms. Cassidy?

MS. CASSIDY: Yes, Your Honor.

THE COURT: You understand that recommendations as to sentence, including motions for downward departure, are not binding on me? I don't have to follow them.

THE DEFENDANT: Yes, sir, I understand that.

THE COURT: I know Mr. Cage has discussed guideline sentencing with you. I need to tell you that under the Sentencing Reform Act of 1984, the United States Sentencing Commission issued guidelines for judges like me to follow in cases like yours. And I'm sure that Mr. Cage could go down the guidelines and make a prediction as to what your sentence may be, but it's just a prediction and nobody at this time knows what guideline will actually apply to your case, and we won't know until Mr. Cox –

[11] THE PROBATION OFFICER: Your Honor, –

THE COURT: Oh. Mr. Novak?

THE PROBATION OFFICER: Yes.

THE COURT: – completes your presentence report, you get a chance to review it, the government reviews it, objections are made, I rule on them, and then we'll know what guideline applies. You understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: In some cases I might give you more than that called for by the guidelines or less. You might appeal or the government might appeal. Do you understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Did you, as charged in Count 1, conspire with others while you were a senior vice-president of the Commercial National Bank, whose deposits were insured by the Federal Deposit Insurance Corporation, to knowingly, willfully and with intent to deceive the bank misapply funds belonging to or entrusted to the care and custody of said bank?

THE DEFENDANT: I did, Your Honor.

THE COURT: All right. Have a seat, Mr. Cage. You have a witness, Ms. Cassidy?

MS. CASSIDY: Yes, Your Honor. We would call up Agent Hudson.

(Witness sworn.)

DIRECT EXAMINATION

[12] BY MS. CASSIDY:

Q. Would you please state your name and your occupation.

A. My name is David Hudson. I'm an FBI agent.

Q. Agent Hudson, in 1997 what was Mr. Hagan's position with Commercial National Bank?

A. He was a vice-president in the energy department for Commercial National Bank.

Q. And was Commercial National Bank a federally insured institution, insured by the FDIC?

A. Yes, ma'am.

Q. And are you familiar with Padre Trading Company?

A. Yes, ma'am.

Q. And what was Padre Trading Company's relationship with CNB and with Mr. Hagan?

A. They were a customer of CNB. They had obtained a line of credit –

Q. And how –

A. – to operate a refinery in Lisbon, Louisiana.

Q. How would they – as I understand, Padre Trading Company was a Texas corporation?

A. Correct. It was incorporated in Texas and also in Louisiana.

Q. The principals of Padre Trading, were they located in Houston?

A. Yes, ma'am.

[13] Q. And how did they come to have a relationship with CNB and with Mr. Hagan?

A. The principals of Padre Trading Company were Jerry LaBarba and John Cooke. Mr. LaBarba was the president and Mr. John Cooke was the vice-president of marketing. And Mr. LaBarba, who is from Houston, Texas, as is John Cooke, had previously had a relationship with Mr. Hagan when Mr. Hagan was in the banking business in Houston, Texas, and when they obtained an operating agreement to operate the Lisbon refinery in Lisbon, Louisiana, Mr. LaBarba recontacted Mr. Hagan to obtain financing to purchase feedstock for their Lisbon refinery.

Q. And did they obtain lines of credit and loans through Mr. Hagan at Commercial National Bank?

A. Yes, ma'am, they did.

Q. And in fact, was Commercial National Bank, some of the officers, not really sure of this loan?

A. That's correct.

Q. And so Mr. Hagan had used his position to encourage the other officers to accept the loan?

A. That's correct.

Q. Now, did there come a time in early 1997 when the refinery was suffering a cash shortage?

A. Yes, ma'am. Basically, the refinery was suffering from a cash shortage from the outset, but it got severely bad in [14] approximately April of '97.

Q. Did the officers of Padre Trading begin depositing checks that were drawn on other banks which were insufficient checks?

A. That's correct, they did.

Q. At some point in 1997, as alleged in the Bill of Information, did Mr. Hagan become aware that the checks being deposited were not sufficient?

A. That's correct. I think after the first two or three he then became aware and joined in the conspiracy in that the checks were in fact no good and that they would be returned because of insufficient funds.

Q. What actions did Mr. Hagan take with regards to the checks when they were returned to the bank?

A. In some cases, Mr. Hagan would turn around and have the checks redeposited, which would grant them additional time in order to utilize the funds as well as to get other checks in to cover the ones that had been written.

Q. Did this involve what would be referred to as a check kiting scheme?

A. That's correct.

Q. Was Padre given immediate credit by Mr. Hagan when he knew the checks were not sufficient?

A. Yes, ma'am, he did.

Q. Did that cause a loss to the bank by funds being wired [15] out of the Padre account or either checks drawn on Padre being paid?

A. That's correct. Had a total loss of approximately $4.8 million as a result of the check kiting.

MS. CASSIDY: I'll tender, Your Honor.

THE COURT: Mr. Hudson, why did he do this?

THE WITNESS: He – he developed a real close relationship with the principals of Padre Trading Company, and it was always his desire to get involved in the petroleum and exploration, mainly the exploration end of the petroleum business, and that was his motivation, is eventually he wanted to become a part of Padre Trading Company.

MS. CASSIDY: Your Honor, may I ask a couple more questions along the that line?

THE COURT: Yes.

BY MS. CASSIDY:

Q. Did Mr. Hagan also have strong feelings about the account since he had brought it in to the bank?

A. Oh, yes, he did.

Q. And he had also – at this time was Commercial National Bank going through a buyout by Deposit Guaranty?

A. That's correct.

Q. Did he also believe that eventually his job might be eliminated as the energy department at Commercial?

A. That's correct.

[16] Q. And then you stated he also thought that Padre could be a successful company?

A. That's correct, he did.

Q. Did he mention to other people that if it were successful, that he might have a position with Padre?

A. Yes, he did.

THE COURT: Ms. Cassidy, tell me the standard here on "with intent to injure or defraud the bank."

MS. CASSIDY: Yes, sir. Your Honor, I think that the intent to defraud means that he had to have the specific intent or intend to act to deceive or cheat someone, and I think that we're talking about the deception here as opposed to an actual intent to defraud.

THE COURT: Okay. Mr. Cage?

MR. CAGE: Your Honor, I just have maybe a couple questions for Special Agent Hudson.

CROSS-EXAMINATION

BY MR. CAGE:

Q. Special Agent Hudson, I think you testified that Mr. Hagan was not aware of the first two or three checks, I think were deposited by either Trimar or Jerry LaBarba, that they were in fact no good; is that correct?

A. That's correct.

Q. And at some point during this time, early to mid May is when Mr. Hagan became aware that these

accounts had either [17] been closed or there were non-sufficient funds; is that correct?

A. That's correct.

MR. CAGE: That's all I have, Your Honor.

MS. CASSIDY: Your Honor, if I may, I think I misstated that. I think I meant to say that it was an intentional conversion of the property for the benefit of one's self or of another, and that would be the willful misapplication.

THE COURT: So that is good – that's the law?

MS. CASSIDY: That's correct.

THE COURT: For the benefit, it reads from the jury instructions?

MS. CASSIDY: Yes, Your Honor. I'm reading from the "willfully misapply" –

THE COURT: Or another.

MS. CASSIDY: – under the pattern jury instructions.

THE COURT: Okay. Mr. Hagan, do you have any questions you want to ask Agent Hudson?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you agree with what he said?

THE DEFENDANT: Yes, sir, Your Honor. I don't have any dispute with that.

THE COURT: All right. You may step down. Thank you, Mr. Hudson.

[18] If you will come back up, please, Mr. Hagan. Since you acknowledge you're in fact guilty as charged and since you know what your rights are and what the maximum possible punishment is, the plea is voluntary and there is a factual basis for it, so I'm going to accept your guilty plea and order the clerk to enter the plea. You now stand convicted.

I'm going to order a presentence investigation. Please cooperate with Mr. Novak. It's going to be awfully important in determining what your sentence will be.

I'm going to set a recognizance bond, unless the government has some reason why not?

MS. CASSIDY: No, Your Honor.

THE COURT: So ordered.

I'm going to set sentencing for February the 10th in the year 2000 at 1:15 here in this courtroom. You understand you have to be here at that time?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Thank you, Mr. Cage, Mr. Donald.

MR. CAGE: Thank you, Your Honor.

MR. DONALD: Thank you, Your Honor.

THE COURT: Ms. Cassidy, thank you. And this concludes the Court's business today.

(Proceedings concluded at 10:30 a.m.)

[19] CERTIFICATE

I, Marie Moran Runyon, Official Court Reporter, do hereby certify that the foregoing pages numbered 1 through 18 do constitute a true and correct record of proceedings had in said hearing to the best of my ability and understanding.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Subscribed and sworn to this 15th day of November, 1999.

/s/ Marie Moran Runyon
Marie Moran Runyon, RMR, CRR
U.S. Court Reporters Office
300 Fannin Street, Suite 4212
Shreveport, Louisiana 71101
Phone: (318) 222-9203
email: mmoran@prysm.net

RULE 11 PACKAGE

UNITED STATES OF AMERICA verses RILEY HAGAN, III

Criminal No. _____

Please find enclosed copies of the following documents:

_____	Indictment
X	Bill of Information
X	Waiver of Indictment
X	Plea Agreement
X	Elements of the Offense
X	Affidavit of Understanding of Maximum Penalty
_____	Factual Basis for Plea

Guilty Plea set on Friday, November 12, 1999, at 10:00 a.m., in Shreveport, Louisiana.

cc: Judge Walter
U.S. Probation Office
Defense Attorney – Joseph S. Cage
AUSA Sonia Peters Cassidy
U. S. Marshal's Office
FBI – SA David Hudson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	CR. NO. _____
	*	
VERSUS	*	18 U.S.C. §371
RILEY HAGAN, III	*	JUDGE WALTER
	*	

BILL OF INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE
18 U.S.C. §371

A. Introduction

At all times material herein:

1. Commercial National Bank (hereinafter referred to as CNB) of Shreveport, Louisiana was a banking and financial institution with deposits insured by the Federal Deposit Insurance Corporation.

2. Deposit Guaranty National Bank (hereinafter referred to as Deposit Guaranty), Jackson, Mississippi, was a bank owned by Deposit Guaranty Corporation, with deposits insured by the Federal Deposit Insurance Corporation.

3. CNB was acquired by Deposit Guaranty Corporation, but continued to operate as CNB until CNB merged with Deposit Guaranty on July 14, 1997.

4. Padre Trading Company, Inc. (hereinafter referred to as Padre), was a corporation under the laws of the States of Louisiana and Texas.

5. James G. "Jerry" LaBarba, Sr. was President of Padre and John R. Cooke was Vice-President of Marketing.

6. Padre opened checking account number 610-0053314 at CNB with James G. "Jerry" LaBarba, Sr. and John R. Cooke authorized to sign on the account.

B. Offense

Beginning sometime in 1997, the exact date being uncertain, and continuing up to or on or about June 20, 1997, in the Western District of Louisiana and elsewhere, the defendant, Riley Hagan, III, while Senior Vice-President of Commercial National Bank, whose deposits were insured by the Federal Deposit Insurance Corporation, and others, known and unknown, wilfully and knowingly did conspire and agree together to commit an offense or offenses against the United States, to wit: Title 18, United States Code, Section 656, that is to knowingly, wilfully and with intent to deceive the above bank, misapplied funds belonging to and entrusted to the care and custody of said bank.

C. Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, Riley Hagan, III and others, committed or caused to be committed, the following overt acts, among others, within the Western District of Louisiana and elsewhere:

1. A series of fourteen (14) checks were deposited into Padre's checking account number 610-0053314 with

Commercial National Bank between the dates of April 29, 1997 and June 20, 1997, which checks were drawn on accounts with insufficient funds.

2. When various banks returned the checks for insufficient funds, the defendant, Riley Hagan, III, sent the checks back for collection, thus increasing the time for the worthless checks to be presented and returned to Commercial National Bank.

3. After Riley Hagan granted Padre immediate credit for the items Hagan knew were insufficient, he then allowed CNB funds to be wired from Padre's account and checks drawn on Padre's account to be paid when in fact the account was in overdraft status.

The conspiracy set forth herein, and the above-described overt acts, being in violation of Title 18, United States Code, Section 371.

A TRUE BILL OF INFORMATION.

MICHAEL D. SKINNER
United States Attorney

By: _____

SONIA P. CASSIDY,
I.D. #8615
Assistant United States Attorney
300 Fannin St., Suite 3201
Shreveport, LA 71101-3068
(318) 676-3600

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NUMBER
	*	
	*	JUDGE WALTER
v.	*	MAGISTRATE JUDGE
RILEY HAGAN III	*	PAYNE

WAIVER OF INDICTMENT

I, RILEY HAGAN, III, the above named defendant, who is accused of violating Title 18, United States Code, Sections 371 and 656 being advised of the nature of the charges, the proposed information, and of my rights, hereby waive in open court on Friday, November 12, 1999, at 10:00 a.m., prosecution by indictment and consent that the proceeding may be by information rather than by indictment.

_____

RILEY HAGAN III
DEFENDANT

_____

JOSEPH S. CAGE
DEFENSE ATTORNEY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO.
	*	JUDGE WALTER
VERSUS	*	MAGISTRATE JUDGE
RILEY HAGAN III	*	PAYNE

PLEA AGREEMENT

1. In consideration of the Defendant, Riley Hagan III, entering a plea of guilty to the one count Bill of Information filed in this case, a basis in fact for said plea being established by the Court, pursuant to the Federal Rules of Criminal Procedure 11(f), the Government agrees it will not prosecute the Defendant for any other offense known to the United States Attorney's office based on the investigation which forms the basis of the Bill of Information.

2. The Defendant understands that as part of the presentence investigation the Government will make available to the Court all evidence developed in the investigation of this case.

3. Defendant acknowledges and understands that this case is governed by the Sentencing Reform Act and has discussed the Sentencing Guidelines and their applicability with counsel. The Defendant understands and acknowledges that a final determination of the applicable guidelines range cannot be made until the completion of the pre-sentence investigation and that sentencing in this matter is within the discretion of the Court. Defendant

further understands and acknowledges that the maximum punishment on Count One is a fine of not more than $1,000,000 (pursuant to 18 U.S.C. §656), or a term of imprisonment of not more than 5 years (pursuant to 18 U.S.C. §371), or both. Additionally, under the Sentencing Reform Act, Defendant may receive a term of Supervised Release of not less than 2 years nor more than 3 years in length in addition to any term of imprisonment imposed by the Court. Defendant understands that a violation of the conditions of Supervised Release at any time during the period of Supervised Release may result in the Defendant being incarcerated over and above any period of imprisonment initially ordered by the Court. Defendant further understands that the period of incarceration for a violation of a condition of Supervised Release could be as much as the full term of Supervised Release initially ordered by the Court regardless of the amount of time of the Supervised Release Defendant had successfully completed.

4. Defendant acknowledges and agrees that the failure of the Court to adhere to a sentencing recommendation tendered by counsel shall not be a basis for setting aside the guilty plea which is the subject of this agreement.

5. The Defendant further understands that, in accordance with 18 U.S.C. § 3013, upon conviction the Court shall assess the amount of $100.00 per count. Defendant understands and agrees that, as a condition of this plea agreement, this assessment **must and will be paid by the Defendant at the plea** by means of cashier's check or money order made payable to "Clerk, U. S. District

Court." Defendant further understands that said assessment is in addition to the maximum punishment referred to in the preceding paragraphs.

6. The Defendant understands and agrees that in addition to the penalties set forth in the preceding paragraphs, the Court may order him to make restitution to the victims in this and that the amount of restitution and method of payment is in the discretion of the Court.

7. The Defendant agrees to cooperate fully and truthfully in the Government's investigation and prosecution of the acts which led and relate to the charges in this matter, such cooperation including, but not limited to, testifying before the grand jury or at trial if requested. Defendant understands that Defendant's failure to testify truthfully can result in Defendant's being prosecuted for perjury or giving false statements and in the Government withdrawing from this Plea Agreement.

Defendant understands that while Defendant is being offered use immunity for all statements to law enforcement agents and testimony, such statements and testimony are subject to the penalties of perjury and giving false statements if not completely honest and factual, and that this Plea Agreement can be withdrawn if Defendant makes false statements or substantially misrepresents Defendant's role in the offense.

8. At or before the time of sentencing, the United States will advise the Court of any assistance provided by the Defendant in the ongoing investigation into bank fraud and related criminal activity within the Western District of Louisiana and elsewhere, or in the prosecution of another person who has committed a criminal offense.

The United States may, but shall not be required to, make a motion requesting the Court to depart from the sentencing range called for by the guidelines in the event he provides "substantial assistance." This decision shall be in the sole and non-reviewable discretion of the United States Attorney.

It is understood and agreed that a motion for departure shall not be made, under any circumstances, unless the Defendant's cooperation is deemed "substantial" by the United States Attorney. The United States has made no promise, implied or otherwise, that the Defendant will be granted a "departure" for "substantial assistance." Further, no promise has been made that a motion will be made for departure even if Defendant complies with the terms of this agreement in all respects, but has been unable to provide "substantial assistance."

It is understood that even if a motion for departure is made by the Government, based upon Defendant's perceived "substantial assistance," the final decision as to how much, if any, reduction in sentence is warranted because of that assistance, rests solely with the District Judge.

9. This is the entire plea agreement between the United States Attorney's Office and the Defendant and is entered into freely, knowingly, and voluntarily with no threats or coercion, after due consultation with counsel.

Signed this ___ day of November, 1999.

MICHAEL D. SKINNER
United States Attorney

Sonia Peters Cassidy
(Bar Roll # 8615)
Assistant United States Attorney

Riley Hagan III
Defendant

Joseph S. Cage
Attorney for Defendant

ELEMENTS OF OFFENSE

18 U. S. C. § 371

CONSPIRACY

In order to be found guilty the government must prove:

First: That the defendant and at least one other person made an agreement to commit the crime of misapplication of bank funds as charged in the bill of information;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

ELEMENTS OF OFFENSE

18 U.S.C. §656

THEFT OR EMBEZZLEMENT BY BANK OFFICER OR EMPLOYEE

Five essential elements are required to be proved in order to establish the offense charged in the indictment:

1. That the defendant was an officer [director] [agent] [employee] of the bank described in the indictment;

2. That the bank was a federally insured bank at the time alleged;

3. That the defendant willfully misapplied funds belonging to or entrusted to the care of the bank;

4. That the defendant acted with intent to injure or defraud the bank; and

5. That the amount of funds misapplied was in excess of $1,000.00.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO.
VS.	*	JUDGE WALTER
RILEY HAGAN III	*	MAGISTRATE JUDGE PAYNE

UNDERSTANDING OF MAXIMUM PENALTY AND CONSTITUTIONAL RIGHTS

I, RILEY HAGAN, III, the above named defendant, having been furnished a copy of the charge and having discussed same with my attorney, state that, I understand the nature of the charge against me and the maximum possible penalty that may be imposed against me as set forth in the plea agreement.

I further state that I understand:

1. My right to be represented by counsel (a lawyer) of my choice, or if I cannot afford counsel, my right to be represented by Court-appointed counsel at no cost to me.

2. My right to plead guilty or not guilty.

3. My right to have a jury trial with twelve jurors who must all agree as to my guilt in order to convict.

4. My right not to be required to testify against myself or at all, if I do not so desire.

5. My right to confront and cross-examine witnesses against me and my right to have compulsory process to require witnesses to testify.

I realize that by pleading guilty I stand convicted of the crime charged and waive my privilege against self-incrimination, my right to jury trial, my right to confront and cross-examine witnesses, and my right of compulsory process.

I further state that my plea in this matter is free and voluntary and that it has been made without any threats or inducements whatsoever (except the plea agreement) from anyone associated with the State or United States Government or my attorney and that the only reason I am pleading guilty is that I am in fact guilty as charged.

Thus done and signed this ____ day of _____, 1999.

RILEY HAGAN, III
Defendant

JOSEPH S. CAGE
Attorney for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA **NUMBER: 99-CR-50095-01**

VERSUS

RILEY HAGAN, III **JUDGE DONALD E. WALTER**

EXHIBIT "A"

AFFIDAVIT OF RILEY HAGAN, III

STATE OF LOUISIANA

PARISH OF CADDO:

BEFORE ME the undersigned Notary Public, in and for the State and Parish aforesaid, personally came and appeared:

Riley Hagan, III, a resident of Caddo Parish, Louisiana, who, being duly sworn, deposes and says:

1. My name is Riley Hagan, III. I have attained the age of majority and am otherwise competent to make and give this affidavit.

2. I resigned from Deposit Guaranty National Bank on July 15, 1997 as Senior Vice President and Energy Department Manager. I was employed by Deposit Guaranty National Bank and its predecessor since November 1991.

3. I am aware that my affidavit will be submitted in connection with my sentencing hearing in the captioned matter.

4. I make and give this affidavit based on my personal knowledge of the status of Commercial

National Bank, and its successor by merger, Deposit Guaranty National Bank (hereafter "CNB" or the "Bank") as lender to Padre Trading Company, Inc. ("Padre") and my personal involvement with the Padre loan and deposit accounts at the Bank.

5. My responsibilities at the Bank included direct responsibility for the Padre Trading Company, Inc. account relationship. I was the account officer for Padre from the beginning of that relationship in September of 1996 until late June of 1997.

6. This affidavit is submitted to the Court in the captioned matter with a compilation prepared by my attorneys under my direction of (1) various records and documents of the Bank (the "Bank's Documents"), and (2) that certain "Confidential Settlement Agreement" dated February 26, 1999, by and between the Bank and me (the "Confidential Settlement Agreement") and related documents. These documents are submitted to the Court in the captioned matter in a notebook entitled "Calculation of 'Loss' for Purpose of Federal Sentencing Guidelines" ("Loss Calculation Notebook").

7. I hereby certify that the Bank's Documents are documents and records maintained by the Bank in the course of its regularly conducted business activities, having been obtained from (a) the records of the Bank maintained by me while in the employ of the Bank, (b) the production of documents made by the Bank to my attorneys and me in the civil lawsuit between the Bank and me which was settled by the Confidential Settlement Agreement, and (c) the production of documents made by the Bank to the U.S. Justice

Department in its investigation of the Padre account overdrafts.

8. I hereby certify that the Confidential Settlement Agreement included in the Loss Calculation Notebook is a true and correct copy of that document entered into by and between the Bank and me, and is a document maintained by the Bank and me in the course of its regularly conducted business activities.

9. The principal behind Padre was Mr. James G. ("Jerry") LaBarba, an individual of substantial means with whom I had previously made successful loans in the past.

10. LaBarba and Padre leased the old Claiborne Gasoline Refinery in Lisbon, Louisiana in 1996. This refinery had been a highly successful gas processing plant that was transformed into a modern, small refinery. It was capable of producing a full line of petroleum products. It employed approximately 70 people.

11. The Bank conducted an in-depth analytical review of Padre's request for extension of credit. The business forecast and all economic evaluations by the Bank's credit analysts indicated a highly profitable venture.

12. Important factors in the Bank's extension of credit to the Bank and to me included: (1) the track record of Mr. LaBarba in prior creditor/borrower relationships, (2) the fact that Padre's trade partners were known customers of the Bank: Falco S&D as the supplier of the crude oil feedstock and Davidson Petroleum as purchaser/transporter of the finished product, and

(3) the association of Bob Roddey as a consulting engineer in the operation of the Lisbon refinery.

13. Bob Roddey is a highly respected and successful engineer in Shreveport. Mr. Roddey, a graduate of Louisiana Tech University in Chemical Engineering, was employed at the old Claiborne Gas Company Lisbon Refinery while he was a student at Tech. He had continued to consult at this facility over the years and is very familiar with the design and operation of the refinery. Many of the applied processes being utilized in the plant were created by Mr. Roddey. As late as May 28, 1997, Mr. Roddey was attempting to participate economically in the Lisbon Refinery rather than providing services to Padre on a hourly basis.

14. In my capacity as Padre's account officer, I received daily faxed reports from Padre's Houston office concerning amount and value of the crude oil and refined petroleum product in inventory, both at the Lisbon refinery and at other storage locations. At no time during my employment at the Bank did I ever know or suspect any problems with these reports.

15. In May of 1997, some of the checks that Padre had deposited with the Bank were returned for insufficient funds. Specifically, three checks deposited into Padre's account with the Bank were charged back as being drawn on insufficient funds or on closed accounts. The first was drawn on a Trimar account at Sterling Bank in Houston, Texas, later discovered to be a LaBarba company, and two checks were drawn on LaBarba's personal account at NationsBank in Houston.

16. I was initially told by LaBarba and Mr. John R. Cooke, LaBarba's partner in Padre, that the problem with these checks was a "mix up" in closing a deal with Enron and an error in depositing funds into the wrong account.

17. During a meeting in Houston with LaBarba and Cooke around May 20, 1997, I was told for the first time that these checks had been knowingly drawn on accounts with insufficient funds in order to buy time for Padre to close a transaction with potential investors. LaBarba and Cooke reiterated to me that Padre needed only a few days to conclude the transaction with its investors, and pleaded for my assistance in buying a little more time. They suggested that this could be accomplished through the scheme already initiated by them.

18. Rather than report to my supervisors at the Bank what I learned at that meeting, I agreed to assist Padre, LaBarba, and Cooke in buying additional time by assisting them with the timing of additional deposits with the Bank that I knew were drawn on accounts with insufficient funds. In total, I assisted with three deposits from June 3 through June 13, 1997, involving eleven checks.

19. I acted to protect my reputation at the Bank from being blemished by a bad credit and to buy time for my customer, with the mistaken belief that, by doing so, the customer, Padre, would be able to become the profitable venture which I understood it could be and repay the Bank. The investors, however, never materialized, and, by mid-June, 1997, the Bank learned of the true status of the Padre account and my involvement.

20. The deficit in the Padre account at the Bank due to the overdrafts in mid-June, 1997, was $4,844,243.53, but that indebtedness was instantaneously secured by first liens on Padre's inventory of crude feedstock and refined petroleum products, which totaled over $4.3 million at the time, and other assets. I also believed that substantially all overdraft amounts were used to acquire feedstock or to provide operating expenses for the refinery.

21. The Bank had a Credit Agreement with Padre that covered all "obligations" of Padre. The term "obligations" in the Credit Agreement was defined to cover all obligations, indebtedness and liabilities of Padre to the Bank, and, therefore, the Credit Agreement covered the indebtedness created by the overdrafts. The collateral for the Credit Agreement included a first priority security interest on all accounts receivable, equipment, machinery, fixtures, and inventory, a mortgage on certain real property owned by Padre's owner, Mr. LaBarba, and a life insurance policy covering Mr. LaBarba. The Credit Agreement also allowed the bank to set off any and all amounts deposited in Padre's accounts against the obligations and required that Continuing Guaranty Agreements in the amount of $1.25 million be executed by both Mr. LaBarba and Mr. Cooke.

22. Rather than immediately foreclose on those assets, the Bank attempted three different workouts with Padre, forbearing collection efforts well into the fall of 1997. These workouts, also designed to give Padre, LaBarba, and Cooke more time to close their purported deal with investors, ultimately proved to be unsuccessful.

23. When the overdraft became apparent, the Bank was concerned about its collateral position, and Ronald G. Smith, Senior Vice President and Commercial Lending Division Manager (my direct superior) and I personally went to the Lisbon refinery to determine the inventory situation on Saturday, June 21, 1997. We were also met at the refinery by representatives of Martin Gas, another Bank customer, at Mr. Smith's request. To the best of my knowledge, Martin Gas was and is independent with respect to this matter. Mr. Smith and I personally observed the Martin Gas employees gauge each and every tank on location and test the product in the laboratory at the refinery. Every reading was compared with and matched on a tank-by-tank basis with the most recent report the Bank had from Padre.

24. During the course of this same weekend in late June of 1997, the Bank requested and received independent gauging of tanks containing Padre inventory at locations other than Lisbon. These measurements were taken by employees of the owners of the tank farms being leased by Padre to store inventory.

25. By Monday, June 23, 1997, all inventory had been measured by independent representatives. The total inventory at that time was 49,670 barrels of liquid product inventory and 151,807 barrels of crude condensate, as documented by information received from the Bank through civil discovery and provided by the Bank to the U.S. Attorney.

26. Based on the calculations made in the attached worksheet, the value of the inventory on or about June 24, 1997, consisted of refined product

in the amount of $1,356,251 and crude oil in the amount of $3,036,140, for a total inventory value of $4,392,391.

27. Padre also had accounts receivable in the amount of $103,281.67 at Falco S&D.

28. Padre also had on deposit at the Bank, in a Cash Collateral Account, cash in the amount of $61,964.37.

29. CNB also had as collateral real estate equity in excess of real estate debt in the amount of $430,000.

30. The total determinable collateral available to offset the overdraft was $4,987,637.04. I believe that other collateral as well as guarantor support from Mr. LaBarba particularly, and to a lesser extent, Mr. Cooke, were also available to refund the overdraft, although I have to this point been unable to obtain the information necessary to make those determinations.

31. Rather than foreclose on this inventory, the Bank chose to amend the Credit Agreement with Padre by instrument dated June 30, 1997. The Credit Agreement was amended again on July 18, 1997, and for a third time on August 8, 1997. Sometime thereafter, the operation failed.

32. At the time of the workout, the Bank valued the inventory at $27.30 per barrel for liquid products and $20.00 per barrel for crude. The Bank's own figures results in inventory credit alone of $4,392,391.00. In addition, Padre also had $61,964.37 in a cash collateral account that could be used as an offset against the overdrawn account. Finally, Padre had real estate equity in excess of real estate debt in the amount of $430,000.00. This results in excess collateral of

$143,393.47 and leaves a net loss of "0" as shown below:

Overdrawn Account	<$4,844,243.57>
Product Inventory	1,356,251.00
Crude Inventory	3,036,140.00
Falco S&D Credit	103,281.67
Deposit Accounts	61,964.37
Real Estate Net Equity	430,000.00
Excess Collateral	$ 143,393.47

33. The Bank ultimately filed suit against Padre, LaBarba, and Cook and other parties in Louisiana state court. Default judgments were taken and confirmed against those defendants. In June of 1998 the Bank filed a separate state court action against me for damages concerning the facts, circumstances, and events surrounding the Padre account and overdraft situation, claiming that my conduct and failure to act constituted breaches of legal and contractual duties to the Bank.

34. In my answer to the Bank's petition, I filed third-party claims against Padre, LaBarba, and Cooke, and asserted counter-claims against the Bank for damages arising from (a) the breach of the Bank's duties to provide me appropriate supervision and training, (b) the failure of the Bank to consistently enforce and comply with applicable statutes, rules and regulations, and (c) the failure of the Bank to provide indemnification and/or applicable insurance coverage.

35. The lawsuit between the Bank and me was settled with the execution of the Confidential Settlement Agreement. Pursuant to the Confidential Settlement Agreement, I agreed to

release my counter-claims against the Bank, dismiss the lawsuit with prejudice as to the Bank and paid to the Bank the sum of Eight Hundred Thousand and No/100 Dollars ($800,000.00) in exchange for the following agreements of the Bank: (a) the claims of the Bank against me were released, (b) the lawsuit was dismissed with prejudice as to me, (c) the Bank agreed to indemnify and hold me harmless from and against any and all claims, causes of action, judgments, liabilities, losses, and expenses, including attorney's fees, which were based upon, result from, or arise out of the lawsuit or the facts underlying the lawsuit, including any demands, claims, actions, and causes of action which might be asserted against me by the Bank and The St. Paul Mercury Insurance Company or any other insurance or bonding company, concerning loss suffered by such companies, and (d) the Bank assigned to me all judgments it had obtained against LaBarba, Cooke, Padre, and other defendants.

Further, Affiant saith not.

/s/ Riley Hagan, III
RILEY HAGAN, III

SWORN TO AND SUBSCRIBED at Shreveport, Caddo Parish, Louisiana, in the presence of the undersigned Notary on this the 18th day of April, 2000.

/s/ Michael Donald
NOTARY PUBLIC
Caddo Parish, Louisiana
My Commission is for Life

MICHAEL B. DONALD, NOTARY PUBLIC
STATE OF LOUISIANA
MY COMMISSION IS FOR LIFE
FILED UNDER SEAL

SCHEDULE OF COLLATERAL

(Attached to and made a part of the Affidavit of Riley Hagan, III)

Product Inventory Value (from 6/24/97 Bank memo): **$1,356,251**

At 65 cents per gallon, or $27.30 per 42-gallon barrel, this demonstrates that 49,670 barrels of product were in inventory ($1,356,251 divided by $27.30).

Crude Inventory Value (calculated from Bank records): **$3,036,140**

Since bank records show a total of 201,477 barrels on hand, and it can be shown that, of those total barrels, 53,819 consisted of product, the difference must be crude barrels (201,477 less 49,670 equals 151,807 barrels of crude). Assuming $20 per barrel, as the bank did in its workout documents, yields a Crude Inventory Value of $3,036,140 (151,807 times $20).

Total Inventory Value (Product plus Crude): **$4,392,391**

$1,356,251 plus $3,036,140 equals $4,392,391

Cash Collateral (from Bank records): **$61,964.37**

Falco S&D Credit: $103,281.67

Real Estate Net Equity In Excess of Real Estate Debt: $430,000

Total Collateral Available for offset: $4,987,637.04

FILED UNDER SEAL

CONFIDENTIAL
SETTLEMENT AGREEMENT

This "Confidential Settlement Agreement" (hereinafter sometimes referred to as "Agreement") is entered into by and between:

> FIRST AMERICAN NATIONAL BANK, operating as DEPOSIT GUARANTY NATIONAL BANK, a national banking association which is the successor by merger to Commercial National Bank in Shreveport, represented herein by its undersigned, duly authorized officer (hereinafter sometimes referred to as "**DGNB**"); and
>
> RILEY HAGAN, III, an individual who has attained the age of majority and who resides in Shreveport, Caddo Parish, Louisiana (hereinafter sometimes referred to as "**Hagan**").

RECITALS

WHEREAS, certain disputes have arisen between DGNB on the one hand, and Hagan on the other, in connection with Hagan's employment at DGNB and the handling of the Padre Trading Company, Inc. ("Padre") account at DGNB;

WHEREAS, these disputes are set forth in the following described lawsuit:

> "Deposit Guaranty National Bank vs. Riley Hagan, III," No. 432,529-A, First Judicial District Court, Caddo Parish, Louisiana (the "**Action**");

WHEREAS, DGNB filed this Action against Hagan, and Hagan answered the Action denying any wrongdoing and all liability and filed a Reconventional Demand

against DGNB and a Third Party Demand against James G. LaBarba, Sr. ("**LaBarba**"), John Cooke ("**Cooke**"), Padre Trading Company, Inc. ("**Padre**"), Richard Plato ("**Plato**"), and Trimar Corp. ("**Trimar**");

WHEREAS, DGNB answered the Reconventional Demand denying any wrongdoing and all liability;

WHEREAS, LaBarba, Cooke, Padre, Plato and Trimar have not responded to the Third Party Demand or otherwise made an appearance in the Action;

WHEREAS, Deposit Guaranty Corp., the parent company of DGNB, filed a "Proof of Loss" with The St. Paul Mercury Insurance Company concerning loss sustained in connection with the Padre account at DGNB;

WHEREAS, by means of this Agreement, DGNB and Hagan intend to fully and unconditionally release and compromise any and all claims, known and unknown, they may have against the other arising out of or in any way relating to the Action or the facts underlying the Action, all as more particularly described hereinbelow;

WHEREAS, by means of this Agreement, Hagan expressly reserves any and all claims, rights, warranties, demands, debts, obligations, liabilities, costs, expenses, causes of action, and judgments, known or unknown, which exist or which Hagan may claim to exist against LaBarba, Cooke, Padre, Plato, and/or Trimar;

NOW, THEREFORE, in consideration of the mutual covenants and agreements of DGNB and Hagan set forth hereinbelow, the adequacy of which is hereby expressly agreed to and acknowledged, DGNB and Hagan hereby agree as follows:

ARTICLE 1

1.1 For and in consideration of the covenants and agreements of Hagan set forth hereinbelow, DGNB, on behalf of itself, its officers, directors, agents, employees, shareholders, affiliates, parent companies, subsidiaries, successors and assigns, does hereby settle, compromise, waive, release and abandon any and all claims, rights, demands, actions, and causes of action which it has or may have against Hagan, directly or indirectly, arising out of or related to or flowing from the Action or the facts underlying the Action, including, but not limited to, any demands, claims, actions, and causes of action which might be asserted against Hagan by DGNB, its parent companies, affiliates, and subsidiaries and The St. Paul Mercury Insurance Company or any other insurance or bonding company, concerning loss suffered by such companies.

1.2 For and in consideration of the covenant sand agreements of DGNB set forth hereinbelow, Hagan, on behalf of himself, his agents and attorneys, does hereby settle, compromise, waive, release, and abandon any and all claims, rights, demands, actions, and causes of action which he has or may have against DGNB, its officers, directors, agents, employees, shareholders, affiliates, parent companies, subsidiaries, successors, and assigns, directly or indirectly, arising out of or related to or flowing from the Action or the facts underlying the Action.

1.3 The parties hereto acknowledge that this Agreement is in settlement and compromise of doubtful disputed civil claims and is not an admission of any liability

or of any error, weakness, or insufficiency of the parties' respective claims and positions. Rather this Agreement represents the respective decisions of the parties, each weighing the hope of gain against the possibility of loss associated with their respective claims and mutual benefits flowing from an amicable resolution of their disputes.

1.4 DGNB warrants and represents that it is the sole owner of any and all claims, actions, and/or causes of action against Hagan which arose or may arise out of or are in any way related to or based upon, directly or indirectly, the Action or the facts underlying the Action. DGNB also warrants and represents that it has not assigned or transferred, nor has it purported to assign or transfer, to any third-party, any interests in the claims, actions and/or causes of action which arose or may arise out of or are in any way related to or based upon, directly or indirectly, the Action or the facts underlying the Action.

1.5 Hagan expressly reserves, which reservation DGNB expressly acknowledges, any and all claims, rights, warranties, demands, debts, obligations, liabilities, costs, expenses, causes of action, and judgments, known or unknown, which exist or which Hagan may claim to exist against LaBarba, Cooke, Padre, Plato, and/or Trimar.

ARTICLE 2

2.1 For and in consideration of the respective covenants and agreements set forth herein, the parties hereto shall do or cause to be done the following to implement this settlement and compromise:

2.1.1 Within three (3) days after execution of this Agreement, the parties hereto shall cause to be filed the Joint Motion to Dismiss the Action which is attached to this Agreement as Exhibit "A." As to the claims of DGNB in the Action against Hagan and the claims of Hagan in the Reconventional Demand against DGNB, such shall be dismissed with prejudice. As to the claims of Hagan in the Third Party Demand against James G. LaBarba, Sr., John Cooke, Padre Trading Company, Inc., Richard Plato, and Trimar Corp., such shall be dismissed without prejudice.

2.1.2 Contemporaneously with the execution of this Agreement, Hagan shall pay to DGNB the sum of Eight Hundred Thousand and No/100 Dollars ($800,000.00) in accordance with the written wire transfer instructions provided to Hagan by DGNB at or before the execution of this Agreement.

2.2 In further consideration of the covenants and agreements of the parties set forth herein, DGNB agrees as follows:

2.2.1 DGNB expressly represents and warrants to Hagan that the covenants and agreements herein in this Agreement do not cause or result in a double recovery to DGNB concerning any and all loss sustained by DGNB in connection with the Padre account.

2.2.2 DGNB shall allow Hagan to inspect a copy of any and all settlement agreements, or other necessary documents, entered among DGNB, its parent companies, affiliates, and subsidiaries, and The St. Paul Mercury Insurance Company or any other insurance or bonding

company, concerning the loss sustained by DGNB in connection with the Padre account, in order to confirm that the covenants and agreements herein in this Agreement will not cause or result in a double recovery to DGNB concerning any and all loss sustained by DGNB in connection with the Padre account.

2.3 In further consideration of the covenants and agreements of the parties set forth herein, DGNB agrees to indemnify and hold Hagan harmless from and against any and all demands, claims, actions, causes of action, judgments, liabilities, losses, and expenses, including reasonable attorney's fees, which are based upon, result from, or arise out of the Action or the facts underlying the Action, including, but not limited to, any demands, claims, actions, and causes of action which might be asserted against Hagan by DGNB, its parent companies, affiliates, and subsidiaries and The St. Paul Mercury Insurance Company or any other insurance or bonding company, concerning loss suffered by such companies.

ARTICLE 3

3.1 In further consideration of the covenants and agreements of the parties set forth herein, DGNB agrees that, contemporaneously with the execution of this Agreement, DGNB shall assign and convey to Hagan, through the Assignment of Judgments which is attached to this Agreement as Exhibit "B," any and all judgments it has obtained against James G. LaBarba, Sr., John Cooke, Richard Plato, Padre Trading Company, Inc., and Trimar Corp. in that certain matter styled:

"Deposit Guaranty National Bank vs. James G. LaBarba, Sr., ET AL," No. 425,448-C, First Judicial District Court, Caddo Parish, Louisiana.

3.2 Said Assignment of Judgments shall convey, without any limitation whatsoever, but without any warranty or recourse, all DGNB's rights and entitlements in said judgments, including but not limited to, principal amount, interest and costs.

3.3 Hagan, at his sole and unfettered discretion, may execute upon and otherwise pursue enforcement of said judgments through whatever avenues and procedures he deems fit and may, at his sole and unfettered discretion, enter into any agreements or settlements concerning said judgments without consideration to or consulting with DGNB.

3.4 Hagan shall be entitled to keep all monies or other consideration collected by him or paid or given in satisfaction of amounts owed under said judgments to the extent such does not exceed the amount paid to DGNB by Hagan under this Agreement, plus any and all costs, including, but not limited to, attorney's fees, incurred by Hagan in executing upon and otherwise pursuing enforcement of said judgments, plus any and all costs, including, but not limited to, attorney's fees, incurred by Hagan in the Action, plus any and all costs, including, but not limited to, attorney's fees, incurred by Hagan in connection with any criminal investigation of the loss sustained by DGNB concerning the Padre account or the facts underlying the Action.

3.5 In the event that monies or other consideration paid or given in satisfaction of amounts owed under said

judgments exceeds the amount specified in paragraph 3.4, Hagan agrees to divide with DGNB such excess on a Fifty percent, Fifty percent (50/50) basis.

3.6 Hagan shall account to DGNB as to the calculation and division of funds called for in paragraphs 3.4 and 3.5 by providing statements of third-party service providers, redacted as necessary to protect and preserve attorney-client privilege, work product protection or other privilege as may be applicable. Except for this limited accounting, DGNB expressly waives and hereby abandons and releases any accounting or auditing rights concerning enforcement of this Agreement it may have or claim to have.

3.7 DGNB agrees to take such reasonable action, including, but not limited to, providing testimony and making relevant documents available to Hagan, and to execute any and all such additional documents or instruments as may be necessary to effect the intent of this Assignment of Judgments and allow Hagan to execute upon and otherwise pursue enforcement of said judgments.

3.8 DGNB warrants and represents that it is the sole owner of any and all interests, rights, and entitlement in the judgments against James G. LaBarba, Sr., John R. Cooke, Padre Trading Company, Inc. and Trimar Corp., and in all sums of money, interests, and costs that may be obtained by means thereof, or in or as a result of any proceeding had thereon, and that DGNB has taken no action that in any way whatsoever (i) affects the validity and enforceability of such judgments as full, final and collectable judgments of DGNB; and (ii) operates as a

release of any judgment debtor. DGNB also warrants and represents that it has not assigned or transferred, nor has it purported to assign or transfer, to any third-party any interests in the judgments against James G. LaBarba, Sr., John R. Cooke, Padre Trading Company, Inc. and Trimar Corp.

ARTICLE 4

4.1 In further consideration of the covenants and agreements of the parties set forth herein, DGNB agrees, expressly states, and warrants that but for the information set forth in the Proof of Loss and other documents provided to the Federal Bureau of Investigation, DGNB is aware of no evidence that Hagan intended to defraud DGNB, that he was involved in a scheme to defraud DGNB, or that he intended to cause loss to DGNB.

4.2 DGNB further agrees, expressly states, and warrants that at all times Hagan has denied any wrongdoing and denied any liability for loss sustained by DGNB in connection with the Padre account at DGNB, and DGNB is aware of no confession or acknowledgement of wrongdoing or liability by Hagan to any third-person.

4.3 DGNB further agrees, expressly states, and warrants that it is aware of no evidence that Hagan obtained any actual financial benefit resulting from the loss to DGNB in connection with the Padre account.

ARTICLE 5

5.1 In further consideration of the covenants and agreements of the parties set forth herein, DGNB

expressly acknowledges and recognizes that James S. Lenoir ("Lenoir") will execute and deliver an affidavit in the substance and form attached hereto as Exhibit "C," which affidavit is made a part of this Agreement.

5.2 DGNB agrees that Lenoir's execution and delivery of this affidavit is hereby deemed to have been compelled by the force of law as if given in response to questions validly posed after Lenoir's attendance had been compelled by subpoena properly issued.

5.3 DGNB agrees to waive, relinquish and abandon any and all claims, rights, demands, actions, and causes of action which it may have against Lenoir, directly or indirectly, arising out of or related to or flowing from his execution and delivery of the affidavit, and DGNB agrees to indemnify and hold Lenoir harmless from and against any and all demands, claims, actions, causes of action, judgments, liabilities, losses, and expenses, including reasonable attorney's fees, which are based upon or arise out of Lenoir's execution and delivery of the affidavit. Any costs, including but not limited to attorney's fees, incurred by Lenoir in preparation for the execution of this affidavit are not covered under this paragraph 5.3.

5.4 DGNB further agrees that neither it nor anyone on its behalf will attempt to contact or communicate with Lenoir in any way whatsoever, either directly or indirectly, concerning the affidavit, except as may be requested by and in conjunction with counsel for Hagan to confirm and assure Lenoir of the substance and binding effect of this Article 5 in this Agreement.

5.5 DGNB expressly states that any and all facts and opinions set forth in Lenoir's affidavit are not and have

never been DGNB's recitation of facts nor are they or have they ever been the opinions of DGNB.

ARTICLE 6

6.1 In further consideration of the covenants and agreements of the parties set forth herein, the parties agree that the provisions of this Agreement, including Exhibit "C", are confidential and shall not be disclosed in whole or in part by any party without the prior written consent of all parties; provided, however, that such written consent shall not be required for any disclosure (i) made pursuant to any existing or future order of or upon demand of Governmental Authorities having jurisdiction and their staff; or (ii) made in connection with an audit or for tax purposes; or (iii) made to the United States Attorney or his assistant for the Western District of Louisiana in connection with a pending criminal investigation of the Padre account.

6.2 DGNB agrees that it will not disclose the provisions of this Agreement, except as provided in paragraph 6.1, outside those essential officers, directors, and counsel whose knowledge is required to approve this Agreement.

6.3 DGNB agrees to make the deposition of Hagan taken in the Action on December 1, 1998, and the deposition taken in the Padre Trading Company, Inc. bankruptcy on December 30, 1997, subject to the confidentiality restrictions of this Article 6 of this Agreement. The confidentiality obligations of this article concern future communications and dissemination of information and Hagan acknowledges that, prior to the execution of this Agreement, except for the confidential

settlement negotiations which have been conducted between the parties as to this Action, no confidentiality obligations existed. As to the December 1, 1998, deposition of Hagan taken in this Action DGNB agrees to join in and support the filing of an appropriate joint motion to have any and all parts of the deposition filed in the suit record for the Action placed under seal.

6.4 DGNB further agrees that it will reimburse and pay Hagan for any and all damages, losses, and expenses, including reasonable attorney's fees, which arise out of the breach or default by DGNB of this Article 6.

ARTICLE 7

7.1 This Agreement may be executed in multiple original counterparts, each of which shall constitute an original but all of which together shall constitute but a single agreement.

7.2 DGNB and Hagan stipulate and acknowledge that each party shall bear its costs incurred in connection with the litigation, as well as in connection with the negotiation and settlement thereof, including attorney's fees, court costs, and any other costs or expenses incurred thereby. Each party hereto grants each other party hereto full acquittance and release for any and all such fees and expenses.

7.3 This Agreement shall be governed by and construed in accordance with the laws of the State of Louisiana.

7.4 Each party hereto represents and warrants to each and every other party hereto that the individuals

executing this Agreement, and the agreements contemplated by this Agreement, have been duly authorized by their respective corporate principals and that this Agreement and the other documents contemplated by this Agreement, shall be binding on the parties hereto in accordance with the provisions of such documents.

7.5 The parties hereto agree that this Agreement may not be modified or amended except by a written amendment executed by all the parties hereto in a form specifically denoted as an amendment and referring to this Agreement.

7.6 The parties hereto acknowledge and agree that during the course of implementing this Agreement, including the documents contemplated thereby, other documents may need to be executed in order to effect the intent of the parties. Each party hereto agrees to execute any and all such additional documents or instruments as may be necessary to effect the intent of this Agreement and the documents contemplated by this Agreement.

7.7 This Agreement is intended to be binding on the parties hereto and is subject to specific performance without the necessity of a showing of irreparable injury.

WITNESSES:

/s/ Adele Ladnier

/s/ Cynthia B. Harper

DEPOSIT GUARANTY NATIONAL BANK

BY: /s/ Frank E. Meigs III
FRANK E. MEIGS, III
Senior Vice President

WITNESSES:

/s/ William T. Gates

/s/ Virginia E. McKnight

/s/ Riley Hagan III
RILEY HAGAN, III

STATE OF MISSISSIPPI

COUNTY OF RANKIN

On this 25th day of February, 1999, before me appeared FRANK E. MEIGS, III, to me known, who, being by me duly sworn, did say:

That he is the duly authorized Senior Vice President of Deposit Guaranty National Bank, a national banking association, and that the foregoing Confidential Settlement Agreement was signed on behalf of said association by authority of the association, and said Appearer acknowledges said Agreement to be the free act and deed of the association.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ Angel P. Coleman
NOTARY PUBLIC in and for
Rankin County, Mississippi
Notary Public State of Mississippi At Large
My Commission Expires July 13, 2002
Bonded Thru [Illegible], Brooks & Garland, Inc.

STATE OF LOUISIANA

PARISH OF CADDO

On this 26th day of February, 1999, before me appeared RILEY HAGAN, III, to me known, who, being by me duly sworn, did say:

That he acknowledges that the execution of the foregoing Confidential Settlement Agreement was executed as his free act and deed.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

/s/ Michael B. Donald
NOTARY PUBLIC in and for
Caddo Parish, Louisiana

MICHAEL B. DONALD, NOTARY PUBLIC
STATE OF LOUISIANA
MY COMMISSION IS FOR LIFE

EXHIBIT
"A"

DEPOSIT GUARANTY NATIONAL BANK	:	NUMBER: 432,529-A
VERSUS	:	FIRST JUDICIAL DISTRICT COURT
RILEY HAGAN, III	:	CADDO PARISH, LOUISIANA

JOINT MISSION TO DISMISS

NOW INTO COURT, through undersigned counsel, comes Deposit Guaranty National Bank ("Plaintiff") and

Riley Hagan, III ("Defendant"), who respectfully request that this Court enter a judgment dismissing the above captioned action with prejudice as follows:

1.

The parties have reached an amicable settlement of the above captioned matter.

2.

The parties desire an order be entered dismissing Plaintiff's claims with prejudice.

3.

The parties desire an order be entered dismissing Defendant's reconventional demands against Plaintiff with prejudice.

4.

The parties desire an order be entered dismissing, without prejudice, Defendant's claims against Third Party Defendants: James G. Labarba, Sr.; John Cooke, Padre Trading Company, Inc.; Richard Plato and Trimar Corp.

5.

The respective parties are to bear their own attorney's fees and litigation costs.

WHEREFORE, Deposit Guaranty National Bank and Riley Hagan, III, respectfully request that the above captioned matter be dismissed with prejudice. All of the

costs due the Clerk of Court and all of the costs and commissions due the Sheriff in this case have been paid, as appears from their respective Certificates attached in compliance with the provisions of R.S. 13:1402.

Respectfully submitted,

COOK, YANCEY, KING & GALLOWAY

By: _____
Bernard S. Johnson
Louisiana Bar Roll No. 7280
Cook, Yancey, King & Galloway
333 Texas Street
1700 Deposit Guaranty Tower
Shreveport, Louisiana 71120

– – Attorneys for Plaintiff, Deposit Guaranty National Bank

BARLOW AND HARDTNER L.C.

By: _____
Malcolm S. Murchison
Louisiana Bar Roll No. 9836
Michael B. Donald
Louisiana Bar Roll No. 16891
William T. Gates
Louisiana Bar Roll No. 24426

401 Edwards Street, Tenth Floor
Post Office Box 8
Shreveport, Louisiana 71161-0008
Phone (318) 227-1131

– – Attorneys for Defendant, Riley Hagan, III

DEPOSIT GUARANTY NATIONAL BANK	:	NUMBER: 432,529-A
VERSUS	:	FIRST JUDICIAL DISTRICT COURT
RILEY HAGAN, III	:	CADDO PARISH, LOUISIANA

ORDER

Considering the above and foregoing Joint Motion to Dismiss;

IT IS HEREBY ORDERED, ADJUDGED and DECREED Plaintiff's claims and Defendant's reconventional demand in the above captioned matter are dismissed with prejudice, with each party to pay their respective attorney's fees and litigation costs.

IT IS FURTHER ORDERED that Defendant's Third Party claims in the above captioned matter are dismissed without prejudice.

THUS DONE and SIGNED, at Caddo Parish, Louisiana, this ___ day of ___, 1999.

JUDGE
First Judicial District Court
Caddo Parish, Louisiana.

ORDER PREPARED BY:

William T. Gates
Barlow and Hardtner L.C.
Post Office Box 8
Shreveport, Louisiana 71161-0008
(318) 227-1131

EXHIBIT
"B"

STATE OF MISSISSIPPI,

COUNTY OF RANKIN.

ASSIGNMENT made February 25, 1999, by Deposit Guaranty National Bank, as Assignor, and Riley Hagan, III, 6007 Financial Plaza, Suite 214, Shreveport, LA 71129, as Assignee.

RECITAL

Judgment was entered in the First Judicial District Court, Caddo Parish, Louisiana, on March 30, 1998, in favor of Assignor and against James G. LaBarba, Sr.; John R. Cooke; Padre Trading Company, Inc.; and Trimar Corp., and was duly filed and docketed in the Office of the Clerk of Court, First Judicial District Court, Caddo Parish, Louisiana, on March 31, 1998.

1. Assignment. Assignor hereby assigns to Assignee all Assignor's interest, right and entitlement in the judgment and in all sums of money, interest and costs that may be obtained by means thereof, or in or as a result of any proceeding had thereon, but without any warranty or recourse. As for any sums of money recovered by Assignee, Assignee hereby recognizes, adopts and agrees to be bound by the terms of the Confidential Settlement Agreement entered into by Assignee and Assignor in settlement of that action captioned, "Deposit Guaranty National Bank v. Riley Hagan, III," Number 423,529-A, First Judicial District Court, Caddo Parish, Louisiana, on February 26, 1999.

2. Appointment As Attorney in Fact. Assignor hereby irrevocably appoints Assignee his attorney, to use all lawful means for the recovery of money due or to become due on the judgment and, upon payment, to acknowledge satisfaction or to discharge the judgment. Assignee, at his sole and unfettered discretion, may execute upon and otherwise pursue enforcement of said judgments through whatever avenues and procedures he deems fit and may, at his sole and unfettered discretion, enter into any agreements or settlements concerning said judgments without consideration to or consulting with Assignor. This power of attorney shall not be affected by subsequent disability or incompetence of the principal.

3. Representations. Assignor recognizes that recordation of this assignment will be made by Assignee as appropriate. Assignor further represents that it will take such reasonable action, including, but not limited to, providing testimony and making relevant documents available to Assignee, and to execute any and all such additional documents or instruments as may be necessary to effect the intent of this Assignment and allow Assignee to execute upon and otherwise pursue enforcement of said judgments.

THUS DONE AND PASSED, on this 25 day of February, 1999, in the presence of the two undersigned competent witnesses and me, Notary.

WITNESSES:

/s/ Adele Ladnier

/s/ Cynthia B. Harper

DEPOSIT GUARANTY NATIONAL BANK

By: /s/ Frank E. Meigs III
Frank E. Meigs, III
Senior Vice President

/s/ Angel P. Coleman
NOTARY PUBLIC in and for
Rankin County, Mississippi.
My Commission Expires:
Notary Public State of Mississippi At Large
My Commission Expires: July 19, 2002
Bonded Thru [Illegible], Brooks & Garland, Inc.

EXHIBIT
"C"

DEPOSIT GUARANTY NATIONAL BANK	:	NUMBER: 432,529-A
VERSUS	:	FIRST JUDICIAL DISTRICT COURT
RILEY HAGAN, III	:	CADDO PARISH, LOUISIANA

AFFIDAVIT OF JAMES S. LENOIR

STATE OF MISSISSIPPI

COUNTY OF HINDS

BEFORE ME the undersigned Notary Public, in and for the State and County aforesaid, personally came and appeared:

James S. Lenoir, a resident of Hinds County, Mississippi, who, being duly sworn, deposes and says:

1. My names is James S. Lenoir. I have attained the age of majority and am otherwise competent to make and give this affidavit.

2. I retired from Deposit Guaranty National Bank on June 30, 1998 as Executive Vice-president and Chief Credit Officer. I was employed by Deposit Guaranty National Bank for thirty-four (34) years holding the position of Executive Vice-president and Chief Credit Officer for the last fifteen (15) years.

3. I am aware that my affidavit will be submitted in opposition to the motion for summary judgment filed by Deposit Guaranty National Bank ("DGNB" or the "Bank") in that matter captioned: "Deposit Guaranty National Bank versus Riley Hagan, III", Number 432,529-A, First Judicial District Court, Caddo Parish, Louisiana.

4. I make and give this affidavit based on my personal knowledge of DGNB's status as a lender to Padre Trading Co., Inc. ("Padre"), and Riley Hagan, III's, employment by the Bank and his involvement with the Padre accounts.

5. My responsibilities as Executive Vice-president and Chief Credit Officer included, but were not limited to, supervision and management of the Credit Policy and Administration Division (which included the Central Loan Department), and serving as Chairman of the Credit Policy Committee and Senior Loan Committee.

6. As Chief Credit Officer of Deposit Guaranty National Bank, I was responsible for supervising Central

Loans' handling of the Padre account at the Bank during the "workout" phase. In addition to my supervisory function, I was also personally involved in the workout phase concerning Padre's accounts, specifically, communications during the workout with lending personnel, including Bob Boehmler, David Barrentine, Ronnie Smith, Steve Walker, and Riley Hagan, III.

7. Frank E. Meigs, III, was assigned by me to be directly responsible for the Padre workout. He was my subordinate and ultimately reported to me through the manager of the Central Loan Department, and, in addition, the manager of the Credit Administration Group.

8. Based upon my supervision and personal involvement in the Padre workout, I had occasion to work directly with Riley Hagan, III. During the workout phase, Mr. Hagan's efforts were cooperative and, in my opinion, directed to what he felt were the best interests of the Bank. Based on my experience, Mr. Hagan's actions during this period did not indicate to me that he intended to defraud the Bank, that he was involved in a scheme designed to defraud the Bank, or that he intended to cause loss to the Bank.

9. I have been involved during my tenure at Deposit Guaranty National Bank with young lenders in problem loan situations. In such situations, young lenders can sometimes fail to recognize a problem or underestimate the seriousness of a problem. In the hopes that the problem will take care of itself and go away, they tend to be insular in their thinking, and, as a result, actually contribute to a worsening of the problem over time by either failing to take appropriate actions or taking the

wrong actions. Based on my experience, Riley Hagan, III's actions fit this description. I think he failed to exercise good judgment and common sense when he believed the representations made to him by James G. Labarba, Sr., and John R. Cooke, and was determined he could fix the problem with the Padre loan and deposit accounts. However flawed, I think his actions were, in my opinion, motivated for the best interests of the Bank and designed to remedy the bank's problems with Padre.

10. It is my opinion that the loss sustained by the Bank was directly attributable to the wrongful actions of James G. Labarba, Sr., John R. Cooke and Richard Plato. Although it was never discovered specifically, it is my belief that the only individuals who benefitted from the Bank's loss concerning the Padre Accounts were James G. Labarba, Sr., John R. Cooke, and Richard Plato.

11. The workout agreements reached between Padre and the Bank were structured to keep the refinery in operation in an effort to generate sufficient case flow to recover the loss, either partially or in full.

12. I disagree with the filing of the captioned lawsuit for two principal reasons:

a) First, to my knowledge, the bank has never filed suit against a current or former employee in the lending or investment areas of the bank as a result of a loss where the employee exercised poor judgment, failed to adhere to policies or procedures, or failed to follow instructions of superiors. The lending function in a bank involves the acceptance of risk and a realization that not all loans will be fully repaid and that reasonable and

acceptable losses will occur. When the losses of a particular loan officer become unreasonable and clearly unacceptable, various sanctions can be used to attempt to remedy the problem, which may include dismissal. If the banking industry were to have a practice of suing these employees for making mistakes, it would be impossible, in my opinion, to expect a loan officer to accept that kind of personal financial risk; and

b) Second, this lawsuit was filed only after the bank had learned of Riley Hagan, III's father's-diagnosis with terminal pancreatic cancer. The bank knew the father was a wealthy person, and, in my opinion, assumed that the son would inherit a substantial sum that could then be attached and applied to the bank's loss. I do not think this suit would have ever been filed had the father been a person of limited means.

Further, Affiant saith not.

/s/ James S. Lenoir
JAMES S. LENOIR

SWORN TO AND SUBSCRIBED at Jackson, Hinds County, Mississippi, in the presence of the undersigned Notary on this the 26th day of February, 1999.

[SEAL]

/s/ Vicki McQueen
NOTARY PUBLIC
~~Hinds~~ Rankin County, Mississippi
My Commission Expires: 4/4/02

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA **NUMBER: 99-CR-50095-01**

VERSUS

RILEY HAGAN, III **JUDGE DONALD E. WALTER**

SUPPLEMENTAL EXHIBIT "A-1"

AFFIDAVIT OF RILEY HAGAN, III

STATE OF LOUISIANA

PARISH OF CADDO:

BEFORE ME the undersigned Notary Public, in and for the State and Parish aforesaid, personally came and appeared:

Riley Hagan, III, a resident of Caddo Parish, Louisiana, who, being duly sworn, deposes and says:

1. My name is Riley Hagan, III. I have attained the age of majority and am otherwise competent to make and give this affidavit.

2. I am aware that my affidavit will be submitted in connection with my sentencing hearing in the captioned matter.

3. I make and give this affidavit based on my personal knowledge of the status of Commercial National Bank, and its successor by merger, Deposit Guaranty National Bank (hereafter "CNB" or the "Bank") as lender to Padre Trading Company, Inc. ("Padre") and my personal

involvement with the Padre loan and deposit accounts at the Bank.

4. This supplemental affidavit is submitted to the Court in the captioned matter with a supplemental compilation of documents to clarify information provided by the Government in the Affidavit of Ronald G. Smith, which supplementation includes various records and documents of the Bank (the "Bank's Documents"). These documents are submitted to the Court in the captioned matter as Attachments A.1.a. through A.1.d. to this supplemental affidavit.

5. I hereby certify that the Bank's Documents are documents and records maintained by the Bank in the course of its regularly conducted business activities, having been obtained from (a) the records of the Bank maintained by me while in the employ of the Bank, (b) the production of documents made by the Bank to my attorneys and me in the civil lawsuit between the Bank and me which was settled by the Confidential Settlement Agreement, and (c) the production of documents made by the Bank to the U.S. Justice Department in its investigation of the Padre account overdrafts.

Further, Affiant saith not.

/s/ Riley Hagan, III
RILEY HAGAN, III

SWORN TO AND SUBSCRIBED at Shreveport, Caddo Parish, Louisiana, in the presence of the undersigned Notary on this the 3rd day of May, 2000.

/s/ Michael B. Donald
NOTARY PUBLIC
Caddo Parish, Louisiana

My Commission is for Life

MICHAEL B. DONALD, NOTARY PUBLIC
STATE OF LOUISIANA
MY COMMISSION IS FOR LIFE

EXHIBIT A.1.a

[LOGO] COMMERCIAL NATIONAL BANK IN SHREVEPORT
A National Banking Association
333 Texas Street, Shreveport, Louisiana
711[illegible]
(Herein "Bank")

MASTER NOTE

Houston, Texas April 18, 1997

For value received, the undersigned, in solido, promise to pay to the order of Bank the lesser sum of **Two Million Five Hundred Thousand and No/100** Dollars ($2,500,000.00) or the principal balance outstanding hereunder pursuant to the provisions of the Bank's Letter of Credit Application and Agreement, as applicable, dated April 18, 1997 for Bank's Letter of Credit No. 2113, including any amendments or additions thereto, (herein "Commitment") at the principal or any branch office of Bank together with interest, according to the marked rate, marked repayment provisions, and marked other provisions set forth below or in the Commitment. The actual amount due and owing from time to time hereunder shall be evidenced by Bank's records of receipts and disbursements or deposits and debits to deposit accounts, as

applicable, which shall be conclusive evidence of such amount. Interest shall be calculated on amounts outstanding for actual days elapsed on a basis of a 365 day year.

RATE:

[ ] FIXED INTEREST RATE: The simple interest rate on this master note (herein "Note") is __% per annum from _____ until paid.

[X] VARIABLE INTEREST RATE: The simple interest rate on this Note is 3% above the index rate (herein "Index Rate") marked below from DATE OF FIRST ADVANCE until paid.

The simple interest rate on this Note may vary from time to time, one or more times, based upon corresponding increases and/or decreases in the Index Rate checked below, and is adjustable DAILY.

The interest Index Rate on this Note is:

[X] (1) The prime or base lending rate of DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI

The prime or base lending rate is the rate of interest established by the Board of Directors or management of said bank from time to time as its prime or base rate, whether or not that rate is published, and is not necessarily the lowest rate it charges on its loans.

[ ] (2) Other (specify):

PAYMENT PROVISIONS:

[X] Principal shall be due ON DEMAND

[X] Interest shall be due QUARTERLY

[ ] Other:

Principal and interest or any part thereof may be prepaid at any time without penalty.

OTHER PROVISIONS:

[X] NON-REVOLVING: This note evidences the total amount that Bank has agreed to lend in the Commitment. Advances will be made as described in the Commitment and in this Note. This Note does not evidence a revolving credit or line of credit agreement.

[ ] REVOLVING: This Note evidences the credit limit of revolving credit that Bank has agreed to lend in the Commitment. Advances will be made as described in the Commitment and in this Note. The unpaid principal balance may increase and decrease as advances and repayments are made. This Note shall evidence all the indebtedness from time to time existing pursuant to the Commitment, even though the aggregate principal cumulative advances may exceed the maximum principal amount available under the Commitment. Payments made on this Note will not extinguish this Note.

[ ] LATE CHARGE: Failure by maker to make any payment within fifteen (15) days of when due, will result in a late payment charge of 5% of the delinquent payment, but not less than $25.00 or more than $500.00.

[X] GOVERNING LAW

Bank and the undersigned severally agree that this Note and the loan for commercial, business, or agricultural purposes evidenced by this Note shall be governed by LSA-R.S. 9:3509 and other applicable Louisiana law. Therefore, the undersigned may pay

Bank any agreed rate of interest even in excess of the maximum rate authorized by the laws of Louisiana and may not assert the defense or claim of usury in connection with this Note.

[X] SECURITY

The obligations evidenced by this Note are secured by the mortgage given in each present and future obligations mortgage, by the security interest granted in each security agreement, by each assignment of leases and rents, by each existing collateral pledge, and by each existing security right executed or to be executed by the undersigned in favor of Bank or executed or to be executed by any third party to secure the obligations of the undersigned in favor of Bank, unless limited therein. Except for IRA, tax-deferred, and fiduciary deposit accounts, the undersigned hereby grant Bank a right of offset in all deposit accounts and certificates of deposit to secure the obligations evidenced by this Note and, except as prohibited by the Truth in Lending Act and Regulation Z, any other obligations of favor of Bank.

[X] GENERAL PROVISIONS

This note shall immediately become due and payable at Bank's option without demand, notice, or putting a default if the makers, endorsers, guarantors, or sureties, or any of them, should: 1) fail to pay or perform any obligation of this Note or any other obligation in favor of Bank, 2) violate any federal, state, or local environmental law, regulation, rule, order, permit, license, or ordinance, 3) fail to perform any covenant of any present and future obligations mortgage, collateral mortgage note, collateral mortgage, collateral chattel mortgage note, collateral chattel mortgage, security agreement, pledge, in favor Bank, 4) die, 5) consolidate, merge,

dissolve, liquidate, or terminate existence, 6) become insolvent, 7) be unable to pay debts as they mature, 8) suspend business, 9) engage in a respite, 10) engage in an assignment for the benefit of creditors, 11) be the subject of a receivership, 12) be convicted of a crime other than a traffic violation, 13) allow his property to become subject to any tax lien or be sold by local, state or federal taxing authorities, 14) conceal, remove, transfer or permit to be concealed, removed, or transferred any of his property with intent to hinder, delay, or defraud any creditors; 15) transfer any of his property to any creditor on account of an antecedent debt while insolvent if such transfer has the effect of preferring that creditor over other creditors, 16) file or have filed against him a petition for an order for relief under the Bankruptcy Code, 17) fail to pay the Note in full in the event of negative amortization, 18) allow any of his property to be seized by any federal or state drug or other law enforcement authorities, or 19) be the subject of a judgment.

The undersigned and each of them hereby waive presentment for payment, demand, notice of dishonor and protest, and consent that the time of payment may be extended one or more times without notice thereof, and, in the event of non-payment at maturity or any other default described in the previous paragraph, agree, in solido, to pay all reasonable attorney's fees incurred in the collection of this Note, or any portion thereof including interest, which fees are hereby fixed at 10% on the amount to be collected.

[ ] OTHER:

_____ Endorser	**PADRE TRADING COMPANY, INC.**
_____ Endorser	By: /s/ James G. LaBarba, Sr. Maker James G. LaBarba, Sr., President
_____ Endorser	By: _____ Maker
Business	_____ Maker

LETTER OF CREDIT
CONTINUING GUARANTY
TO
COMMERCIAL NATIONAL BANK IN SHREVEPORT
Shreveport, Louisiana

In consideration of the Commercial National Bank in Shreveport, Shreveport, Louisiana, giving or extending terms of credit to:

PADRE TRADING COMPANY, INC.

hereinafter called debtor, I hereby give this Continuing Guaranty to the said Bank, its successors, transferees or assigns, for the payment in full of any indebtedness, direct or contingent, of said debtor to said Bank, up to the principal amount of

****Two Million Five Hundred Thousand and No/100 ($2,500,000.00) United States Dollars****

whether due or to become due and whether now existing or hereafter arising; and I hereby bind and obligate

myself, my heirs and assigns, in solido with said debtor, for the payment of the said indebtedness precisely as if the same had been contracted and was due and owing by me in person, hereby agreeing to, and binding myself, my heirs, and assigns, by all the terms and conditions contained in any note or notes signed or to be signed by said debtor, making myself a party thereto; and, waiving all notice and all pleas of discussion and division, I agree to pay upon demand at any time to, said Bank, its successors, transferees or assigns, the full amount of said indebtedness up to said principal amount together with interest, fees and charges which may be due in addition thereto. The Bank may extend any obligation of the debtor one or more times and may surrender any securities held by it without notice or consent from me, and I shall remain at all times bond hereby notwithstanding such extension and/or surrender.

Liability under this guaranty is occasioned by the fact that you have or will issue your Letter of Credit in favor of:

Falco S&D, Inc.

950 Wells Island Road

Shreveport, LA 71107

in the amount of

****Two Million Five Hundred Thousand and No/100 ($2,500,000.00) United States Dollars****

pursuant to our request dated April 18, 1997.

IT IS EXPRESSLY AGREED, that this Continuing Guaranty is absolute and complete, and that acceptance and

notice of acceptance thereof by the Bank are therefore unnecessary and they are hereby expressly waived.

In Faith Whereof, I have hereunto signed by name on this 18th day of April, 1997.

By: /s/ John Cooke
John Cooke (Guarantor In Solido)

Letter of Credit No. 2113

LETTER OF CREDIT
CONTINUING GUARANTY
TO
COMMERCIAL NATIONAL BANK IN SHREVEPORT
Shreveport, Louisiana

In consideration of the Commercial National Bank in Shreveport, Shreveport, Louisiana, giving or extending terms of credit to:

PADRE TRADING COMPANY, INC.

hereinafter called debtor, I hereby give this Continuing Guaranty to the said Bank, its successors, transferees or assigns, for the payment in full of any indebtedness, direct or contingent, of said debtor to said Bank, up to the principal amount of

****Two Million Five Hundred Thousand and No/100 ($2,500,000.00) United States Dollars****

whether due or to become due and whether now existing or hereafter arising; and I hereby bind and obligate myself, my heirs and assigns, in solido with said debtor, for the payment of the said indebtedness precisely as if

the same had been contracted and was due and owing by me in person, hereby agreeing to, and binding myself, my heirs, and assigns, by all the terms and conditions contained in any note or notes signed or to be signed by said debtor, making myself a party thereto; and, waiving all notice and all pleas of discussion and division, I agree to pay upon demand at any time to, said Bank, its successors, transferees or assigns, the full amount of said indebtedness up to said principal amount together with interest, fees and charges which may be due in addition thereto. The Bank may extend any obligation of the debtor one or more times and may surrender any securities held by it without notice or consent from me, and I shall remain at all times bond hereby notwithstanding such extension and/or surrender.

Liability under this guaranty is occasioned by the fact that you have or will issue your Letter of Credit in favor of:

Falco S&D, Inc.

950 Wells Island Road

Shreveport, LA 71107

in the amount of

****Two Million Five Hundred Thousand and No/100 ($2,500,000.00) United States Dollars****

pursuant to our request dated April 18, 1997.

IT IS EXPRESSLY AGREED, that this Continuing Guaranty is absolute and complete, and that acceptance and notice of acceptance thereof by the Bank are therefore unnecessary and they are hereby expressly waived.

In Faith Whereof, I have hereunto signed by name on this 18th day of April, 1997.

By: /s/ James G. LaBarba, Sr.
James G. LaBarba, Sr.
(Guarantor In Solido)

Letter of Credit No. 2113

LINE OF CREDIT/COMMITMENT TRANSMITTAL

Customer Name: (1) Padre Trading Company, Inc.

Address: (2) 1600 Smith St., Ste 3550

Houston,	TX	77000-7347
City	State	Zip

Officer: (4) R. Smith

Officer No. (5) 566

Account Type: (7) E

Borrower No: (3) 6100652560

SS/Tax ID No.: (6) 76-0502229
(If New Account)

SIC Code: (8) 1311
(If New Account)

LINE/COMMITMENT INFORMATION:

Amount: (9) 2,382,651.43

(10)

[X] New

[ ] Renewal (Reaffirmation)

[ ] Extension

[ ] Increase From $ _____

[ ] Decrease From $ _____

[ ] Other _____

(11)

Fee: [ ] Yes
[X] No

(If yes, complete next section.)

Line Of Credit No. (12) ___-___

Commitment No. (13) Cool

Sequence No. (14) ___-___

Effective Date: (15) 7/23/97

Loan Committee Date: (16) _____

Expiration Date: (17) ON DEMAND

Review Date: (18) _____

Risk Rate: (19) 9

Federal Reporting Class: (20) 521

Collateral Class: (21) HB

Purpose Code: (22) 52

Description: (25) Back up to Letter of Credit

FEE INFORMATION:

Coll Meth: (24) _____
Billing Code (25) _____
Billing Date (26) _____
Fee Accrual
Yr Base (27) _____
(28)

NA: [ ] Master Note
[ ] Hand note
(Single Pay)

Debit Acct: (29) [ ] Yes
[ ] No

Acct No. (30) _____

Fee Basis: (31)
1. [ ] Unfunded Fee %: 1. _____
2. [ ] Funded 2. _____
3. [ ] Combined 1 3. (Fill in 1 & 2)
4. [ ] Original An 4. _____

Fixed (Periodic) Fee: On demand
(Amount)

Front End Fee:* _____
(Amount)

(* Origination/Commitment/Facility, etc.)

APPROVAL:

Officer Authority: (32) [Illegible]

Rule of Joining: JSL SCW CQB RHB

Committee: _____
_____

Date: _____

Date: _____

Input: (33) _____
Signature
Date

FOR OFFICE USE ONLY / M.I.S. / COMMENTS: (34)

Form No. 00-110-078 (Rev. 2/93)

EXHIBIT

A.1.b.

TO: VAULT AREA DATE: 9-29-97

RE: ADDITIONAL ADVANCES

A NEW NOTE IL# 1427111 IN THE NAME OF Padre Trading Company, Inc. HAS BEEN MADE AGAINST THE COLLATERAL HELD BEHIND THE FOLLOWING NOTE(S). PLEASE FLAG THESE NOTES TO HOLD COLLATERAL UNTIL ALL HAVE BEEN PAID IN FULL.

IL#	L&D	
		200
		400
		1426246
		1406685

AUTHORIZED SIGNATURE: Tami L. [Illegible]

00-990-455

DEPOSIT GUARANTY NATIONAL BANK
333 Texas Street, Shreveport, Louisiana [illegible]
(herein "Bank")

50-C001- -0652560
Note #1427111
RS566/MBP
N RG

MASTER NOTE

HOUSTON, TX XXXXX JULY 22, 1997

For value received, the undersigned, in solido, promise to pay to the order of Bank the lesser sum of FOUR HUNDRED EIGHT-SEVEN THOUSAND SIX HUNDRED SIX AND 85/100***** Dollars (*****487,606.85) or the principal balance outstanding hereunder pursuant to the provisions of the Bank's Letter of Credit Application and Agreement, as applicable, dated JULY 22, 1997, including any amendments or additions thereto, (herein "Commitment") at the principal or any branch office of Bank together with interest, according to the marked rate, marked repayment provisions, and marked other provisions set forth below or in the Commitment. The actual amount due and owing from time to time hereunder shall be evidenced by Bank's records of receipts and disbursements or deposits and debits to deposit accounts, as applicable, which shall be conclusive evidence of such amount. Interest shall be calculated on amounts outstanding for actual days elapsed on a basis of a 365 day year.

RATE:

[ ] FIXED INTEREST RATE: The simple interest rate on this master note (herein "Note") is __% per annum from _____ until paid.

[X] VARIABLE INTEREST RATE: The simple interest rate on this Note is 3.000% per annum above the index rate (herein "Index Rate") marked below from DATE OF FIRST ADVANCE until paid.

The simple interest rate on this Note may vary from time to time, one or more times, based upon corresponding increases and/or decreases in the Index Rate checked below, and is adjustable daily.

The interest Index Rate on this Note is:

[X] (1) The prime or base lending rate of Deposit Guaranty National Bank.

The prime or base lending rate is the rate of interest established by the Board of Directors or management of said bank from time to time as its prime or base rate, whether or not that rate is published, and is not necessarily the lowest rate it charges on its loans.

[ ] (2) Other (specify):

PAYMENT PROVISIONS:

[X] Principal shall be due ON DEMAND

[X] Interest shall be due QUARTERLY

[ ] Other:

Principal and interest or any part thereof may be prepaid at any time without penalty.

OTHER PROVISIONS:

[X] NON-REVOLVING: This note evidences the total amount that Bank has agreed to lend in the Commitment. Advances will be made as described in the Commitment and in this Note. This Note does not evidence a revolving credit or line of credit agreement.

[ ] REVOLVING: This Note evidences the credit limit of revolving credit that Bank has agreed to lend in the Commitment. Advances will be made as described in the Commitment and in this Note. The unpaid principal balance may increase and decrease as advances and repayments are made. This Note shall evidence all the indebtedness from time to time existing pursuant to the Commitment, even though the aggregate principal cumulative advances may exceed the maximum principal amount available under the Commitment. Payments made on this Note will not extinguish this Note.

[X] LATE CHARGE: Failure by maker to make any payment within fifteen (15) days of when due, will result in a late payment charge of 5% of the delinquent payment, but not less than $25.00 or more than $500.00.

[X] GOVERNING LAW

Bank and the undersigned severally agree that this Note and the loan for commercial, business, or agricultural purposes evidenced by this Note shall be governed by LSA-R.S. 9:3509 and other applicable Louisiana law. Therefore, the undersigned may pay Bank any agreed rate of interest even in excess of the maximum rate authorized by the laws of Louisiana and may not assert the defense or claim of usury in connection with this Note.

[X] SECURITY

The obligations evidenced by this Note are secured by the mortgage given in each present and future obligations mortgage, by the security interest granted in each security agreement, by each assignment of leases and rents, by each existing collateral pledge, and by each existing security right executed or to be executed by the undersigned in favor of Bank or executed or to be executed by any third party to secure the obligations of the undersigned in favor of Bank, unless limited therein. Except for IRA, tax-deferred, and fiduciary deposit accounts, the undersigned hereby grant Bank a right of offset in all deposit accounts and certificates of deposit to secure the obligations evidenced by this Note and, except as prohibited by the Truth in Lending Act and Regulation Z, any other obligations of favor of Bank.

[X] GENERAL PROVISIONS

This note shall immediately become due and payable at Bank's option without demand, notice, or putting in default if the makers, endorsers, guarantors, or sureties, or any of them, should: 1) fail to pay or perform any obligation of this Note or any other obligation in favor of Bank, 2) violate any federal, state, or local environmental law, regulation, rule, order, permit, license, or ordinance, 3) fail to perform any covenant of any present and future obligations mortgage, collateral mortgage note, collateral mortgage, collateral chattel mortgage note, collateral chattel mortgage, security agreement, pledge, in favor of Bank, 4) die, 5) consolidate, merge, dissolve, liquidate, or terminate existence, 6) become insolvent, 7) be unable to pay debts as they mature, 8) suspend business, 9) engage in a respite, 10) engage in an assignment for the benefit of creditors, 11) be the subject of a receivership, 12) be

convicted of a crime other than a traffic violation, 13) allow his property to become subject to any tax lien or be sold by local, state or federal taxing authorities, 14) conceal, remove, transfer or permit to be concealed, removed, or transferred any of his property with intent to hinder, delay, or defraud any creditors; 15) transfer any of his property to any creditor on account of an antecedent debt while insolvent if such transfer has the effect of preferring that creditor over other creditors, 16) file or have filed against him a petition for an order for relief under the Bankruptcy Code, 17) fail to pay the Note in full in the event of negative amortization, 18) allow any of his property to be seized by any federal or state drug or other law enforcement authorities, or 19) be the subject of a judgment.

The undersigned and each of them hereby waive presentment for payment, demand, notice of dishonor and protest, and consent that the time of payment may be extended one or more times without notice thereof, and, in the event of non-payment at maturity or any other default described in the previous paragraph, agree, in solido, to pay all reasonable attorney's fees incurred in the collection of this Note, or any portion thereof including interest, which fees are hereby fixed at 10% on the amount to be collected.

[ ] OTHER:

_____
Endorser

_____
Endorser

_____
Endorser

Business

PADRE TRADING COMPANY, INC.

By: /s/ James G. LaBarba, Sr.
Maker JAMES G. LABARBA, SR., CHAIRMAN OF THE BOARD AND PRESIDENT

By: _____
Maker

_____
Maker

Sworn to and subscribed before me on the 22nd day of July, 1997.

Christine Vicini
Notary Public

[SEAL] CHRISTINE VICINI
MY COMMISSION EXPIRES
July 13, 1998

LINE OF CREDIT/COMMITMENT TRANSMITTAL

Customer Name: (1) Padre Trading Company, Inc.

Address: (2) 1600 Smith, #3550

Houston,	TX	77000-7347
City	State	Zip

Officer: (4) R. Smith

Officer No. (5) 566

Account Type: (7) E

Borrower No: (3) 6100652560

SS/Tax ID No.: (6) 76-0502229
(If New Account)

SIC Code: (8) 1311
(If New Account)

LINE/COMMITMENT INFORMATION:

Amount: (9) 487,606.85

(10)

[X] New

[ ] Renewal (Reaffirmation)

[ ] Extension

[ ] Increase From $ _____

[ ] Decrease From $ _____

[ ] Other _____

(11)

Fee: [ ] Yes
[X] No

(If yes, complete next section.)

Line Of Credit No. (12) _____

Commitment No. (13) Cool

Sequence No. (14) _____

Effective Date: (15) 7/23/97

Loan Committee Date: (16) _____

Expiration Date: (17) 8/31/97

Review Date: (18) _____

Risk Rate: (19) 9

Federal Reporting Class: (20) 521

Collateral Class: (21) HB

Purpose Code: (22) 52

Description: (23) Letter of Credit Back-up

FEE INFORMATION:

Coll Meth: (24) _____
Billing Code (25) _____
Billing Date (26) _____
Fee Accrual
Yr Base (27) _____
(28)

NA: [ ] Master Note
[ ] Hand note
(Single Pay)

Debit Acct: (29) [ ] Yes
[ ] No

Acct No. (30) _____

Fee Basis: (31)
1. [ ] Unfunded Fee %: 1. _____
2. [ ] Funded 2. _____
3. [ ] Combined 1 3. (Fill in 1 & 2)
4. [ ] Original An 4. _____

Fixed (Periodic) Fee: _____
(Amount)

Front End Fee:* _____
(Amount)

(* Origination/Commitment/Facility, etc.)

APPROVAL:

Officer Authority: (32) [Illegible]

Rule of Joining: SCW/JSL CDB RHB

Committee: _____

_____

Date: 7/22/97

Date: _____

Input: (33) _____
Signature
Date

FOR OFFICE USE ONLY / M.I.S. / COMMENTS: (34)

Form No. 00-110-078 (Rev. 2/93)

_____

EXHIBIT

A.1.c.

CC:DJV

MEMORANDUM TO FILE

Date: 8-15-97 Time: 2:50 A.M. [P.M.]

File Reference: PADRE

Telephone Call: _____ To ✓

From Bob B.

Position: _____

Office Conference With: _____

Position: _____

Location: _____

Other: SOLD NAPHTHA TO GAS PRODUCING LIQUIDATORS, A SUB. OF INJECT WHICH IS IN BANKRUPTCY. RECEIVED WIRE FOR $514,645.48, ALSO, 2 MORE SMALL SALES – 29,939.24 & $8,640.27.

RECEIVED 8-15	553,225.79
PRIN. PMT.	-250,000
R/E NOTE PMTS.	-17,242.42
TO CASH COLLAT. ACCT.	285,983.57
OP. EXPENSES	-64,000
FALCO CRUDE PURCHASE (9,500 BBLS)	-205,000
LEFT	16,983.57

FM

_____

EXHIBIT A.1.d.

CONFIDENTIAL

COMMERCIAL LOAN POLICY

FOR

COMMERCIAL NATIONAL BANK

OF

SHREVEPORT, LOUISIANA

COMMERCIAL NATIONAL BANK'S COMMERICAL LOAN POLICY MANUAL WAS DEVELOPED EXCLUSIVELY FOR OUR BANK AND IS THE SOLE PROPERTY OF COMMERCIAL NATIONAL BANK. THE BANK IS NOT ALLOWED TO SELL THE LOAN POLICY MANUAL TO A THIRD PARTY OR ALLOW IT TO BE USED BY ANOTHER PARTY.

I HAVE RECEIVED MANUAL # 1 Barrentine, C. David
Senior Vice President

COMMERCIAL NATIONAL BANK IN SHREVEPORT
LOAN POLICY MANUAL
TABLE OF CONTENTS

SECTION SUBJECT PAGE

Table of Contents

020 General Loan Policy

Statement of Purpose 020.05.1

Compliance With Laws and Regulations....020.10.1

Compliance With Policy 020.15.1

Fair Lending 020.18.1

Credit Scoring 020.20.1

Objectives 020.25.1

Steps to Achieving Objectives.....020.25.2
The Borrower.....020.25.2

Endorsements and Guaranties.....020.25.2
Special Purpose Credit Program
for Borrowers 020.25.3
Small Loans 020.25.3
Loan Maturities.....020.25.3
Compensating Balances/Fees.....020.25.4
Sources of Repayment 020.25.5
Consumer Purpose Loans 020.25.5
Business Purpose Loans.....020.25.6
Management.....020.25.7
Leverage 020.25.7
Market/Industry Analysis.....020.25.8
Financial Statements 020.25.8
Cash Cycle/Cash Flow 020.25.8
Contingent Liabilities 020.25.9
Internal Financial Controls/Accounting...020.25.9
Collateral Analysis.....020.25.9

Loan Officer Responsibilities 020.30.1

Legal Limit and Large Credit Reporting....020.35.1

Administration of the Loan Policy 020.40.1

Asset Policy and Review Committee 020.45.1

Loan Underwriting and Policy Review
Committee.....020.50.1

030 Loan Portfolio Management

Market Area.....030.05.1

Portfolio Mix and Concentration 030.10.1

Secured Loans.....030.15.1

Unsecured Loans 030.20.1

Categories and Maturities of Loans 030.25.1

Classification of Loans.....030.30.1

Types of Notes 030.35.1

Lines of Credit 030.40.1

Commitment.....030.45.1

Loan Pricing.....030.50.1

Loan Pricing Characteristics.....030.55.1

State Usury Laws.....030.60.1

Undesirable Loans.....030.65.1

Unacceptable Loans.....030.70.1

Interest Capitalization.....030.75.1

Waiving of Accrued Interest 030.80.1

Advances on Expired Master Notes 030.85.1

File Maintenance Extensions on Matured Notes 030.90.1

Alteration of Payment Due Dates and Repayment Terms on Existing Notes 030.95.1

Installment Loan Extensions 030.100.1

Booking Code Changes 030.105.1

Real Estate Appraisals 030.110.1

Financial Statements/Credit Information 030.115.1

Loan Participations 030.120.1

Past Due Loans.....030.125.1

Charge Offs and Collections 030.130.1

Non-Accrual Loans 030.135.1

Renegotiated Loans.....030.140.1

Insubstance Foreclosure.....030.145.1

Overdrafts.....030.150.1

040 Loan Approval Policy

Loan Approval Process 040.05.1

Loan Reporting Procedures 040.10.1

Loan Committee Presentations 040.15.1

050 Quality Control

Credit Administration Division.....050.05.1

Credit Services Group 050.10.1

Loan Review Department.....050.15.1

Loan Loss Reserve.....050.20.1

Classification of Credits by the National Bank Examiners 050.25.1

Loan Operations Department.....050.30.1

060 Problem Loan Administration

Watch List Committee 060.05.1

Special Assets Department.....060.10.1

070 Miscellaneous Loan Policies

Environmental Risk Policy 070.05.1

Employee and Officer Loans.....070.10.1

Loans to Executive Officers, Directors, and/or Other Insiders.....070.15.0.1

Criticized/Classified Director Credits.....070.15.1.1

Additional Regulations Bank Employees/ Insiders.....070.15.2.1

Regulation F.....070.20.1

Loans to Foreign Partnerships/
Corporations 070.25.1

Loans to Nonprofit Organizations.....070.30.1

Loans to Political Campaigns 070.35.1

080 Loan Types

Bank Holding Company Loans.....080.120.1

Church Loans
Church Financing.....080.135.1

Consumer Purpose
Time Deposits or Savings Accounts....080.140.0.1
Direct Automobile 080.140.1.1
Indirect Automobile.....080.140.2.1
Direct Boat 080.140.3.1
Indirect Boat.....080.140.4.1
Cash Value Life Insurance.....080.140.6.1
Stocks and Bonds.....080.140.7.1
Loanmaker.....080.140.8.1
Executive Line.....080.140.9.1
Home Equity Line of Credit 080.140.10.1
Educational Student Loans 080.140.11.1
Direct Motorcycle/All Terrain
Vehicle 080.140.12.1
Indirect Motorcycle/All Terrain
Vehicle 080.140.13.1
Direct Recreational Vehicle 080.140.14.1
Indirect Recreational Vehicle 080.140.15.1
Direct Consumer Goods.....080.140.16.1
Indirect Consumer Goods 080.140.17.1
Mobile Homes.....080.140.18.1
Unsecured Consumer Loans.....080.140.19.1

Federal Funds Sold
Downstream Correspondent Banks 080.170.1

Letters of Credit.....080.200.1

Real Estate Loans
Real Estate Policy Overview.....080.270.0.1
Interim Construction – Commercial....080.270.1.1
Interim Construction – Residential....080.270.2.1
Land or Lot Acquisition.....080.270.3.1
Land (Lot) Development 080.270.4.1
Mortgage Loan Warehousing 080.270.5.1
Permanent Commercial Mortgage Loans.....080.270.6.1
Residential Mortgage Loans 080.270.7.1
Purchase/Refinance
Home Equity/Home Improvement

Trust Asset Loans 080.310.1

Small Business Administration 101

Energy Loans
Oil and Gas Production.....111.05.1

Motor Carrier Industry Loans
Revenue Equipment Financing 117.05.1

Accounts Receivable Loans
Contracts Other Than Public or Private Const 124.10.1
State, Parish or City Contracts 124.15.1
U. S. Government Contracts 124.20.1
Trade Accounts Receivable.....124.30.1

Equipment Loans
Equipment Financing 132.05.1

Inventory Loans
Inventory Financing Other Than Floorplans or Warehouse/Trust Receipts ..137.05.1
Floorplan Inventory Financing 137.10.1

Notes Receivable Loans
Finance Companies 139.10.1

COMMERCIAL NATIONAL BANK IN SHREVEPORT
LOAN POLICY MANUAL

SECTION:

LOAN PORTFOLIO MANAGEMENT

SUBJECT:

OVERDRAFTS

PAGE:

030.150.1

DATE:

5/12/93

SUPERSEDES MATERIAL DATED:

Officers should exercise good judgment at all times in the approval of overdrafts, as they are in all respects considered direct extensions of credit and thus part of a customer's total obligation to the Bank. Approval of an overdraft is considered no different from any other extension of credit, requiring adherence to individual credit authority and other approval procedures.

An officer or authorized non-officer may approve an overdraft in excess of his/her authority if:

1. The loan officer has assurance that sufficient funds to cover the overdraft are in the Bank or readily available to be deposited, or

2. The overdraft is covered by an existing line of credit or some other commitment, provided this line or commitment is for the benefit of the same legal entity being overdrawn and with an unused portion at least equal to the amount of the overdraft.

Loan managers should be aware of the amount and frequency of overdrafts to individual and business customers by reviewing overdraft reports and following up with officers when credit extensions could be better managed through a loan to the customer.